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ALEXANDER L. STEVAS,
CLERK

No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

JOINT APPENDIX

PETITION FOR CERTIORARI FILED FEBRUARY 9, 1981

CERTIORARI GRANTED APRIL 6, 1981

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
1/15/80	Complaint filed.
2/22/80	HEARING ON TRO . . . Ordered: Plaintiff's motion for TRO denied. There is no demonstration of irrevocable injury. Case to be addressed on a motion for preliminary injunction to be heard on 3/4/80.
	MOTION by Plaintiff for Temporary Restraining Order.
	Memorandum in support of Motion for Temporary Restraining Order.
2/25/80	MOTION TO DISMISS filed by Defendants Boulder Communications Company, Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen and Dennis DuBé.
3/ 3/80	Motion to Dismiss filed by City of Boulder.
3/ 4/80	HEARING ON Motion for Preliminary Injunction . . . ORDERED Petition of the Colorado Attorney General for leave to file Memorandum as Amicus Curial Denied on limited Grounds of not being in proper jurisdiction of the Amicus Curial role. Motions to dismiss by defendants & deferred ruling until evidence of preliminary injunction has been considered.
	City of Boulder's Brief in Opposition to Plaintiff's. Motion for Preliminary Injunction.
3/ 5/80	HEARING ON Motion for preliminary injunction (Second Day).
3/ 6/80	HEARING ON MOTION FOR PRELIMINARY INJUNCTION . . . (Third day . .) ORDERED: Any offers or objection to deposition testimony shall be submitted in writing after the conclusion of the trial . . . ORDERED: Counsel to file any additional evidence by or on March 10, 1980, at 5 P.M. Any additional authorities should also be submitted by or on March 10, 1980.
	Plaintiff's Supplemental Memorandum in support of Motion for Preliminary injunction.

Date	Proceedings
3/17/80	HEARING ON RULING. Memorandum Opinion and order hand delivered to Counsel. ORDERED: Motion for Preliminary Injunction. . . —granted.
3/27/80	NOTICE OF APPEAL, filed by Defendants, re Order of 3/17/80.
4/ 1/80	Appellant's motion for expedited consideration on the merits filed.
	Brief of appellant in support of motion for expedited hearing filed.
4/ 4/80	Granted appellant's motion for expedited consideration on the merits; disposed of by McWilliams, Breitenstein, Doyle.
4/10/80	Appellant's docketing statement filed.
4/17/80	Record on appeal filed—Volumes I, II, III (pleadings) (957 pg Volumes IV-IX (transcript); Volumes X-XVI (depositions); Volume XVII (exhibits) original record.
4/18/80	Appellee's response to motion of Attorney General, State of Colorado, to file brief and participate in oral argument as amicus curiae filed; Attorney General, State of Colorado, to file brief and participate in oral argument as amicus curiae submitted to panel.
4/21/80	Appellee's motion for reconsideration of order expediting appeal filed.
4/23/80	Appellee's motion to strike appellants' docketing statement denied—Seth.
	Order: State of Colorado is granted leave to become an amicus curiae in this appeal—Seth.
	Order: State of Colorado's motion to participate in oral argument is denied—Seth.
4/23/80	Appellant's response to appellee's motion for reconsideration of order entered April 4, expediting this appeal filed.
4/29/80	Denied appellee's motion for reconsideration of order expediting appeal disposed of by Seth.
5/ 8/80	Case argued and submitted—Seth, Seymour, Markey.

Date	Proceedings
5/ 9/80	On Court's own motion, appellee enjoined from proceeding with construction of new cable TV installations in Boulder—Seth, Seymour, Markey.
5/15/80	Appellee's motion for reconsideration filed.
5/19/80	Appellant's opposition to TCI's motion for reconsideration filed.
5/28/80	Published signed opinion filed—Seth, Seymour, Markey. Writing Judge is Seth.
	Judgment reversed and remanded.
5/28/80	Appellee's reply to City's opposition to appellee's motion for reconsideration of 5/9/80 interim order filed.
6/25/80	Appellee's petition for rehearing en banc filed.
	Amicus curiae memorandum in support of appellee's petition for rehearing filed.
7/ 1/80	Published dissenting opinion filed. Writing judge is Markey.
7/22/80	On the Court's own motion, parties granted to 8/5/80 to file supplemental memoranda relating to rehearing or suggestion for rehearing en banc—Seth, Seymour, Markey.
8/ 5/80	Appellant's memorandum with respect to Markey's dissenting opinion filed.
	Supplemental memorandum of amicus curiae in support of appellee's petition for rehearing en banc filed.
	Appellee's memorandum in support of petition for rehearing en banc filed.
8/ 7/80	Record on Appeal Supplement, Vol. I, Exhibits, org.
10/ 1/80	Order denying appellee's petition for rehearing & suggestion for rehearing en banc. Seth, Seymour, Markey.
10/ 9/80	Mandate issued to District Court.
2/14/81	Appellee's petition for writ of cert filed 2/9/81. Supreme Court No. 80-1350.
4/10/81	Supreme Court order granting appellee's petition for writ of cert on 4/6/81.

ORDINANCE NO. 2846

AN ORDINANCE GRANTING A REVOCABLE PERMIT OF THE CITY OF BOULDER, TO COLORADO TELEVENTS, INC., A COLORADO CORPORATION, TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER, FOR A PERIOD OF TWENTY YEARS; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, Colorado Televents, Inc., a Colorado corporation, with offices at 270 Columbine Street, Denver, Colorado, has made application to the City Council of the City of Boulder for a permit to conduct the business of a community antenna television system in said City of Boulder through the media of transmission by cables, and/or wires, or otherwise, commonly known as a Master Antenna Cable System, and;

WHEREAS, said cable system would be attached to poles whereby said cables, wires, and related appurtenances would cross over the streets, alleys, sidewalks, highways and other public ways and places of the said City of Boulder, and;

WHEREAS, the City Council is of the opinion that the operation of a community antenna television system is necessary so that those persons who are situated in the City so as not to get adequate television reception may receive the same, and;

WHEREAS, the City Council is of the opinion that the best and most practical method of providing said services is by granting to a private person or company, revocable authority and permission to operate such approved system upon terms and conditions prescribed and acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO.

Section 1. That there is hereby granted unto Colorado Televents, Inc., its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, for a period of twenty (20) years from date of final adoption of this ordinance, to conduct the business of a Community

Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit the grantee shall at its own expense remove any poles, wires, cables and related appurtenances that shall have been erected and shall leave the streets, alleys, and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 3. The right to use and occupy said streets, alleys and other public ways for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use in said streets and alleys to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said cables or wires, or other apparatus to their pole facilities.

Section 4. Poles or towers shall be so erected so as not to interfere with the traffic over the streets and alleys, and the location of all poles, towers or other structures on public property shall be placed with prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest and the same shall be

removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, or public places, or municipal or franchised utilities located therein.

Section 5. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said cables, lines and other appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 6. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, sidewalks and public ways and places of the City of Boulder.

Section 7. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 8. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 9. The company hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the system. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000./$300,000. Public Liability, and $25,000./$50,000. Property Damage. Said policy to be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 10. Within thirty (30) days after the final reading of this ordinance by the City Council, the grantee

shall signify its acceptance of the terms herein by filing in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars (5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions of the license or permit by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred; and upon the expiration of 30 days after final reading and upon filing of said bond this license or permit shall be in full force and effect for the full term hereof. The requirement for bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 11. The grantee shall commence operations as a community antenna television system in the City of Boulder within three (3) years from the effective date of this ordinance, or shall otherwise forfeit all rights and privileges granted hereunder, but otherwise this permit to remain in full force and effect.

Section 12. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantee's books and records to verify the amount due the City as reported by the grantee.

This ordinance shall take effect upon the expiration of thirty (30) days from adoption and publication in accordance with the Charter of the City of Boulder.

INTRODUCED, READ AND ORDERED PUBLISHED this 15th day of September, A.D. 1964.

H. PAUL CROUCH

Mayor

Attest:

W. E. GAUSE

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this 6th day of October, A.D. 1964.

H. PAUL CROUCH

Mayor

Attest:

W. E. GAUSE

Director of Finance and Record
Ex-officio City Clerk

RESOLUTION NO. 70
(Series of 1966)

A RESOLUTION CONCERNING THE REVOCABLE PERMIT HERETOFORE GRANTED BY THE CITY COUNCIL OF THE CITY OF BOULDER TO COLORADO TELEVENTS, INC. FOR THE PURPOSE OF CONDUCTING THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER; CONSENTING TO THE ASSIGNMENT OF SAID REVOCABLE PERMIT BY COLORADO TELEVENTS, INC. TO COMMUNITY COMMUNICATIONS COMPANY, A COLORADO CORPORATION; AND, SETTING FORTH DETAILS IN RELATION TO THE FOREGOING.

WHEREAS, the City Council of the City of Boulder by the adoption of Ordinance No. 2846, which was passed and adopted by the said City Council on the 6th day of October, 1964, granted a revocable permit to Colorado Televents, Inc., a Colorado corporation, for the purpose of conducting a business of community antenna television system in the City of Boulder; and,

WHEREAS, Section 7 of said ordinance provides in pertinent part as follows:

> **The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the Grantee and the right granted hereunder shall not be assigned or subleased by the Grantee without the prior written approval of the City of Boulder.**

and,

WHEREAS, Colorado Televents, Inc. has requested the approval of the City of Boulder to the assignment of the revocable permit heretofore granted to Colorado Televents, Inc. to Community Communications Company, a Colorado corporation, and the City Council having considered said request is of the opinion that the same should be granted; provided however, that the assignee of said permit comply with the provisions of said revocable permit regarding the furnishing of a bond in the amount of $5,000 running to and in favor of the City of Boulder, and conditioning the faithful performance of

the terms and conditions of the said revocable permit by Community Communications Company, a Colorado corporation; and further, the furnishing of public liability and property damage insurance in favor of the City of Boulder and in the amount of $100,000-$300,000 public liability, and $25,000-$50,000 property damage, said policy to be negotiated and paid for by the assignee and to be kept in full force and effect throughout the term of said permit; and further, provided that all other requirements stated in said revocable permit have been or will be met by said Community Communications Company, a Colorado corporation; and,

WHEREAS, Colorado Televents, Inc. having heretofore fulfilled its obligations of said revocable permit and not being in default thereof;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BOULDER, THAT:

Section 1. The assignment by Colorado Televents, Inc. of its revocable permit heretofore granted by the City Council of the City of Boulder by the adoption of Ordinance No. 2864 to Community Communications Company, a Colorado corporation, be, and the same hereby is, subject to the conditions hereinabove mentioned, approved.

Section 2. The City Manager be, and he hereby is, authorized and directed to notify Colorado Televents, Inc. and Community Communications Company, a Colorado corporation, of the contents of the within resolution.

INTRODUCED, READ, PASSED AND ADOPTED this 5th day of July, 1966.

/s/ R. W. KNECHT

Mayor

Attest:

/s/ F. J. BURMANT, JR.

Director of Finance and Record
Ex-officio City Clerk

CITY OF BOULDER, COLORADO 80306
PUBLIC LIBRARY, 1000 CANYON BLVD., P.O. DRAWER H

May 25, 1979

Tim Chaffin
Systems Manager, TCI
1032 13th St.
Boulder, CO 80302

Dear Mr. Chaffin,

Library Director Marcelee Gralapp and I very much appreciate your taking the time to meet with us on 5/24/79 to discuss upcoming developments in TCI's Boulder system.

It is very exciting to see the system, at long last, moving towards a fuller realization of its potential. We look forward to your addition of channels for Home Box Office, Madison Square Gardens, Christian Broadcasting and the independents you mentioned.

At the time of our meeting you also stated TCI's intent to connect the Boulder Public Library studio (including line feeds from City Hall and the Senior Center) with the system head end. Ms. Gralapp and I were particularly pleased by this commitment. If, at your earliest convenience, you can supply me with a rough timetable for these installations I will be happy to coordinate arrangements with the City departments involved.

Thank you again for your time and for your commitment to bringing about a truly active cable system for the Boulder community.

Sincerely,

RICHARD VARNES
Director Media & Programming
Boulder Public Library

cc: Robert Westdyke
Melba Shepard, John Torres

July 1, 1979

Mr. Robert Westdyke
City Manager
City of Boulder
Municipal Center
Boulder, Colorado 80302

Dear Mr. Westdyke:

This letter is to introduce the Boulder Communications Company (BCC) and its proposal to bring a comprehensive, public interest oriented cable communications system to the citizens of the City of Boulder.

Accompanying this letter is the proposal and, for your convenience, a brief summary of the proposal. The complete proposal contains an ordinance setting forth features which the City, in past efforts, has ascertained as being in the best interests of its citizens. Also included is a resolution which BCC proposes that the City adopt. This resolution would grant BCC a permit to operate and construct a cable communications system, such permit being contingent only upon BCC showing the city evidence of financial ability to build the system.

We have also included a study which reviews the application of cable communications to various existing and potential government services.

BCC is aware that Tele-Communications, Inc. (TCI) is presently operating a small cable antenna system in the "Hill" area of Boulder. TCI is operating under a permit granted another company in 1964 and subsequently assigned to TCI. The permit contains no provisions for public services to Boulder citizens. In fact, TCI has made no efforts to date to provide service to Boulder other than improved reception of Denver signals, nor has it expanded its system beyond the Hill area.

Whatever action the City takes in regard to TCI, it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit.

BCC is composed of six local citizens. Thomas Cross was a city employee assigned to telecommunications management.

One of his tasks was to advise the City in regard to cable communications. He is presently associated with Storage Technology Corporation. Mr. Kerner is a lecturer in communication law at the University of Colorado, a telecommunications consultant and an attorney whose practice is limited to communication matters. Michael Thompson has been associated with such Boulder firms as Itel, Storage Technology Corp., and NBI. He has a strong background in computer technology, marketing and finance. Donald Passalacqua was a C.P.A. with Arthur Anderson, was a partner in the Boulder accounting firm of Passalacqua, Ford & Fitzpatrick and presently practices public accounting in Boulder. Barry Telleen has been a Boulder resident since 1959. For many years he has been involved in real estate investment in Boulder. Dennis DuBé is Director of the Communications Institute of Boulder, and is presently executive Director of the Boulder Free School. Detailed profiles of the above individuals are included in the proposal.

It should be noted that all of the general partners of BCC are local citizens. It is contemplated that all of the equity participants will be Boulder citizens who will be served by the system and have an interest in service to the City.

Associated with BCC is Coaxial Analysts, Inc., a Denver company that serves the cable television industry with system design, management and financial services. This association provides the partnership with "hands on" experience and assures the City that the system will be constructed in an efficient, computer-assisted manner. Brochures describing Coaxial Analysts are included with this proposal.

BCC looks forward to bringing its fellow citizens the finest, state-of-the-art cable communications system. As set forth in our proposal we plan to offer local origination programming as well as the more exciting "premium" programming. Working with those citizens involved in operating the public access channel, the City government channel and the school channel will be an exciting and creative endeavor. We also are enthused about exploring the exploding revolution in information services.

Inasmuch as Boulder is our home, it is important to BCC that the citizens of Boulder receive the best that cable has to offer. We plan to see that they do.

Kind Regards,

IRVING J. KERNER

Irving J. Kerner

November 28, 1979

Mayor Ruth Correll
320 20th Street
Boulder, Colorado 80302

Dear Ruth:

Prior to tomorrow's study session I would like to share a few thoughts with you regarding Boulder's cable situation.

First, I want you to know that we at BCC firmly believe that we are best qualified to bring a progressive, public interest oriented cable system to Boulder. In our talks with such diverse interests as the University, Naropa, the Chamber of Commerce and numerous citizen groups it has become clear that Boulder citizens desire to have cable services and strongly support our efforts. Thus, although we would prefer to have a permit issued immediately to BCC based upon the new policy ordinance, we are confident about our ability to be successful in a request for bid situation.

One point should be clear to Council, the decision to proceed with the request for bids is not required by legal necessities. It does not solve any legal problems the City may face in the future, including problems of an anti-trust nature.

If Council approves a request for bid approach, the existing permit must either be revoked or the permit holder must agree not to expand. If such is not the case, the request for bid is a sham since no company will bid knowing that TCI is building while it is bidding. The economics of cable are such that once TCI were to build the system no other company could compete.

From our point of view we see no necessity for bids. The City has been open to proposals for years. Last summer we came forth and offered to build a progressive, state-of-the-art system. We have shown our sincerity by developing a community dialogue, and attempting to involve the total community in our proposal. Our proposal contains everything the City has sought from cable, and more. We are ready to begin construction in January. We suggest the City revoke the TCI permit, grant us a new permit consistent with the new policy ordinance

and allow us to bring cable service to Boulder. In the event the City were to take this approach, we would purchase the TCI system and maintain service to its subscribers.

If Council determines that a request for bid approach is required, BCC will participate and expects that Council and the City Manager's staff will come to know that which BCC firmly believes, that is, that there is no question that we are best suited to bring cable services to Boulder and will do so in a superior manner.

Thank you for your attention to this.

Kind Regards,

Irving J. Kerner

TO: Robert G. Westdyke, City Manager, and Members of the City Council

FROM: Joseph N. de Raismes, City Attorney

RE: Legal Constraints Concerning City Regulation of Cable Communications

DATE: December, 1979

At the study session held on Thursday, November 29, 1979, discussion was held concerning the status of cable communications in Boulder. Specifically, the possibility was raised of changing the status of the existing CATV (community antenna television) permit, held by Telecommunications, Inc. ("TCI") and of considering a proposal by Boulder Communications Company ("BCC"), as well as proposals of other potential cable communications operators who have expressed interest since the City Council's last study session, in July. The alternatives are summarized in the memorandum from the Library Director, Marcalee Gralapp, to the City Manager and City Council, dated November 27, 1979.

During the discussion, it became apparent that a major question needs to be addressed prior to any further discussion of the alternatives available to the City, concerning the status of the existing permit (Ordinance No. 2864) held by TCI. This memorandum addresses the legal constraints to be considered in assessing the alternatives now available to the City. However, the analysis contained herein should be viewed as preliminary, and more detailed analysis will be required prior to a final decision in this matter.

CONCLUSIONS:

The City may regulate cable communications over the public right of way, but the extent of regulation must be analyzed in terms of the scope of the City's home rule authority and anti-trust exposure. The TCI permit may be revoked at will, but may not be revoked for an anti-competitive reason. The bidding process proposed by the staff is a viable option, subject to careful attention to the items subject to bid. Notwithstanding economic constraints and possible inconvenience or mischief, the open competitive process proposed by Mr. Danish is also a viable option, subject to careful attention to minimum standards.

FACTS:

Cable communications poses a great potential for innovative communications covering many activities, over and above the inherent data transmission and entertainment value. The advent of satellite transmission capabilities having made increased programming readily available, the existing Boulder permit holder, TCI, proposed last spring to expand the CATV system existing in the "Hill" area of the City. That system, which has been minimally expanded and minimally maintained during the 15 years of its existence, has functioned solely for the retransmission of broadcast signals in the "shadow" area created by Table Mesa.

In 1972 and 1975, the City went through an extensive study of alternatives in cable communications and entertained proposals from inter alia, Tele-Prompter, Sam Street and Associates, and Cable Service of Boulder. For various reasons set forth in the July 25, 1979, memorandum from the Library Director to the City Manager and City Council, none of those proposals came to fruition. However, in each instance, attempts were made to increase the spectrum of cable communications services, to introduce elaborate and innovative broad band communications systems, and to maximize local access to and control of such systems. Meanwhile, since 1964, TCI and its predecessors have essentially "warehoused" the existing CATV system on the Hill.

With the spring announcement that TCI intended to expand its system and the proposal by BCC, and expressions of interest by other potential cable communications operator, the stage is set for a decision by the City Council, which has the responsibility to assure that its control over use of the public right of way is used in such a manner as to assure that the citizens of the City of Boulder get an even break. As stated in the July 25, 1979, memorandum from the Library Director:

> "In the staff's opinion this may well be the last opportunity to take action on improving CATV service. The company

> that builds out the system will be in a virtually unassailable position by the time the permit renewal comes up in 1984. Consequently, it is extremely important to have the best system possible in operation by the time of the permit renewal."

The City Council has expressed some concern over the "Blue Sky" aspects of the cable communications systems which were debated in the early 1970's. However, the City Council has expressed interest in the BCC proposal, and dissatisfaction with the performance of TCI.

In the study session held last Thursday, the staff recommendations were entertained, as was an alternative recommendation by Mr. Danish to issue additional non-exclusive permits. The City Council requested that the City Attorney discuss the constraints applicable to these alternatives, with particular emphasis on the power of the City Council to restrict the activities of the current permittee, TCI.

LEGAL CONSTRAINTS:

In the July 25, 1979 memorandum, the staff indicated that cable communications "is essentially a natural monopoly." However, this point of view has not reached general acceptance. The only note on the question comes to the opposite conclusion:

> Unlike water, gas, and electric companies, where there is great public inconvenience in having numerous concerns serving the same geographical market, CATV is not a natural monopoly. There is only the inconvenience, if that, of having another pair of wires involved in having another additional CATV in a geographical market . . . it would thus seem that the scope of regulation which is natural for natural monopolies is not herein necessary. 41 A.L.R.3d at 384.

The same position was taken by the Public Utilities Commission of the State of Colorado in Decision No. 70749 (January 25, 1968), which stated:

> "The CATV system operators now rendering CATV services in the State of Colorado appear to have convinced

> the municipalities that CATV services should be monopolistic in nature. The argument advanced seems to be that a CATV system has virtually the same characteristics as, for example, an electric system. In other words, it is necessary in order to provide CATV services to construct a system at great cost, and therefore, a duplicate system would constitute considerable economic waste. On the surface, this argument appears to be tenable. We have grave doubts, however, as to whether the actual facts would support the theory. *Id.* at 17.

The PUC went on to find that it had no jurisdiction to regulate CATV services, that the Federal Communications Commission had disclaimed any intent to attempt to regulate such services and that:

> It is extremely doubtful if the municipalities of the State of Colorado have such jurisdiction despite their efforts to achieve some sort of rate regulation by in effect conditioning revocable licenses to utilize streets, alleys and utility easements upon specified . . . rate schedules. If the rendition of CATV services is to be treated as the rendition of a public utility service, then the Legislature of the State of Colorado should be requested to pass the required legislation placing the rendition of such services under proper regulations. *Id.* at 19.

Since the PUC's decision in 1968, the FCC has retreated from its prior rule in cable communications regulation, and has deleted its prior requirement that CATV operators show evidence of local operating authority. Provisions which required public hearings before awarding a permit, a maximum franchise of 15 years, a specific construction schedule and a local complaint procedure have likewise been made non-mandatory. *Report and Order in Docket 21002,* 66 FCC 2d 380 (Sept. 30, 1977).

The only standard retained is the fee limitation, which is also proposed for repeal. *Further Notice of Proposed Rulemaking in Docket 21002,* FCC 79-228, Mimeo No. 5617. Finally, the FCC's channel capacity and access rules have been stricken

down by the U.S. Supreme Court. *FCC* vs. *Midwest Video Corp.* ____U.S.____, 47 L.W. 4335. (April 2, 1979). Citing Section 3(h) of the Communications Act of 1934 and its prior decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), the Supreme Court concluded that Congress had already determined that broadcast facilities should not be treated as common carriers and that licensees should retain "broad journalistic discretion." Therefore, the Supreme Court found the FCC's access rules to be ultra vires and also stated that the first amendment concerns raised by cable communications operators were "not frivolous." 47 L.W. at 4340.

Thus, with both the PUC and the FCC's jurisdictions in doubt, only municipal corporations have been left with the option of seeking to regulate cable communications services in Colorado.

However, since the last consideration by the City of Boulder of its appropriate role in cable communications regulation, the Supreme Court decision of *City of Lafayette* v. *Louisiana Power and Light Company,* 435 U.S. 389 (1978), has greatly restricted the "state action immunity" from the operation of the anti-trust laws previously available to municipal corporations under the leading case of *Parker* v. *Brown,* 317 U.S. 341 (1943). The *City of Lafayette* decision requires that an explicit state policy to displace competition with regulation or monopoly public service be shown prior to recognition of the immunity. 435 U.S. at 413. The Supreme Court's test is unfortunately quite vague:

> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government . . . , an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units exists when it is found from the authority given the entity to operate in a particular area that the legislature contemplated the kind of action complained of. *Id.* at 415.

On September 27, 1979, the Colorado Attorney General rendered an opinion that existing Colorado legislation does not

contemplate the granting of monopoly rights or exclusive licenses to cable communications operators. The home rule power to grant easements on the public right of way is a limited power, with uncertain boundaries, especially when exercised to exclude willing competitors on grounds which go far beyond the protection of the right of way itself.

Thus, in *Community Antenna Television of Wichita, Inc.* v. *City of Wichita,* 471 P2d 360 (1970), the Kansas Supreme Court struck down a cable communications ordinance as ultra vires, and then proceeded to approve the identical ordinance in *Community Antenna Television* v. *City of Wichita,* 495 P2d 939 (Kan. 1972), based upon an intervening declaration of the 1972 Legislature, to the effect that the furnishing of cable communications service is "a private business effected with such a public interest by reason of its use of the public ways, alleys and streets, so as to require it to be reasonably regulated by cities." 495 P2d at 941. Thus, the scope of regulation permitted by the City's control over access to the public right of way may be restricted, just as the City's power to regulate competition is restricted under the *City of Lafayette* case, to the extent that the state law has delegated responsibility to home rule cities to regulate cable communications.

On the other hand, these procedural objections may be overcome by the use of non-exclusive contractual undertakings (*See, e.g., Ill. Broadcasting Co.* v. *City of Decatur,* 238 N.E. 2d 261 (Ill.App. 1968), which held that even though many of the conditions of a cable communications ordinance could not be imposed by the city, the grantee could agree to them.

The preceding discussion indicates the caution which the City Council must use in approaching any regulation of cable communications beyond measures intended to safeguard the right of way. However, given the failure of the state legislature and Public Utilities Commission to act, the inability or failure of the Federal Communications Commission to act, and the importance of cable communications to the public interest, the City may be compelled to act in a legal vacuum. Certainly, the Attorney General's opinion of September 27, 1979, while counseling against exclusive licenses, counsels in favor of

extensive regulatory involvement in order to safeguard competition, and although the case law is spotty, courts have supported municipal assertions of responsibility for cable communications regulation. *See, e.g.,* 41 A.L.R.3d 384; *Akers* v. *Floyd County Fiscal Court,* 556 S.W.2d 146 (Ky. 1977); *Borough of Scottsdale* v. *National Cable TV Corp.,* 368 A.2d 1323, 381 A.2d 859 (Pa. 1977), *TelePrompter of Mohawk Valley, Inc.* v. *Pumilio,* 394 N.Y.S.2d 945 (N.Y. 1977); *Cablevision, Inc.* v. *City of Sedalia,* 518 S.W.2d 48 (Mo. 1974); *G.E. Cablevision Corp.* v. *City of Peoria,* 591 N.E.2d 295 (Ill. App. 1972); *Bush* v. *Upper Valley Telecable Co.,* 524 P.2d 1055, 96 Ida. 83 (1973); *Cablevision of Winston-Salem* v. *Winston-Salem,* 3 N.C. 52, 164 S.E.2d 737 (1968); and *Illinois Broadcasting Co.* v. *City of Decatur, supra.* In each instance, regulation was approved as a contractual undertaking between the cable communications operator and the municipal corporation.

Assuming then that the City may regulate cable communications by conditioning the use of the public right of way upon contractual undertakings by the operators, in the absence of state legislation, the question posed is whether a bidding process, such as that suggested by the staff, is a permissible exercise of power. It appears that a bidding process would avoid or minimize any later claim that the contract was an adhesion contract and not enforceable because of the City's disproportionate bargaining power. Standards would have to be set upon which preference of one bid over another would be based. The more the standards are based upon the discretion of the grantor or franchisor, the more likely it is that an unreasonable restraint of trade can be found. *See, e.g., U.S.* v. *Paramount Pictures, Inc.* 334 U.S. 131 (1947). If a permit or franchise is denied, case law under the Sherman Act indicates that a valid business reason must be given for denying the franchise, *Mercury, Inc.* v. *Ford Motor Co.,* 542 F.2d 466 (8th Cir. 1976), and the standards may not be so restricting so as to apply to only one possible competitor. *George R. Whitten, Jr. Inc.,* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25, 35 (1st Cir. 1970).

Assuming then that the City may regulate cable communications using the public right of way by a public bidding

process, the question arises as to the treatment of the existing permit holder, TCI.

The first question raised at the study session was whether a moratorium could be imposed upon expansion of the TCI cable communications system until a bid process had been completed. Such a moratorium could be imposed upon expansion of the TCI cable communications system until a bid process had been completed. Such a moratorium would clearly be pro-competitive, so that none of the problems raised by the *City of Lafayette* case would impede the City's pursuing a moratorium for such an interim period. In addition, although Section 8 of the permit states that future regulations must be reasonable and not destructive of the rights granted in the permit, the ability of the City to revoke the permit at its pleasure, its non-exclusive nature, and the lack of any particular territorial provisions, leads to the conclusion that a moratorium during the bidding process would be within the contemplation of the existing permit. If TCI is willing to accept such a moratorium on building, that would be the preferred course. However, in the event that TCI is unwilling to accept a moratorium, the same purpose can be achieved with a greater measure of legal certainty by revoking the existing permit and granting a new permit, which, upon acceptance of TCI by performance, would permit TCI to continue to operate in the area in which it now operates with its current cable communications system. It is always possible that TCI could refuse to accept a substitute permit and simply cease performing services in its designated area. However, that risk is present under the language of the current permit, no matter what the City does.

The second question posed is whether a moratorium could be imposed upon TCI after the close of the bidding process, assuming that it was not selected as a successful bidder. If TCI refused to abide by the standards set in the new permit ordinance, a case could be made for revoking TCI's permit on those grounds. However, to the extent that the City Council might wish to restrict TCI from expanding after the conclusion of the bidding process in order to allow the successful bidder to build out his system, significant antitrust problems are posed, which, in the absence of some form of state delegation of authority, makes this option extremely dangerous.

Alternatively, if the City Council should determine that TCI should not be permitted to expand because of its poor maintenance of its existing system and failure to expand that system, while warehousing its permittee status in Boulder, then the City Council is empowered, *on those grounds alone,* to revoke the TCI permit, in whole or in part. It would be possible to allow TCI to continue to operate within its existing area under this option, but the City Council must be careful to build the record for the principle that such revocation is based upon causes totally unrelated to the bidding process. It is clear in Colorado that no specific cause needs to be shown for termination of a contract under express provisions for termination at the option of one or either of the parties. *Ace Fine Service Inc.* v. *Colo. Dept. of Agriculture,* 141 Colo. 467, 348 P2d 962 (1960); *City of Ft. Collins* v. *Park View Pipe Line,* 139 Colo. 119, 336 P2d 716 (1959). However, the antitrust exposure makes a clear justification mandatory in this case.

Of course, should the City Council act to limit the current permit held by TCI, then special care must be taken in order not to interject any anti-competitive aspect into the bidding process, to insure that TCI would not be able to take action against the City based upon antitrust considerations. Thus, if there were only one successful bidder, substantial business justification would have to be given for the selection of only one bidder, and it would not be permissible to grant a "non-exclusive" cable communications permit while contemporaneously agreeing with the permittee that no additional licenses would be granted. In addition, the extent to which local control can be considered as an aspect of the decision would have to be carefully researched. Although the *Borough of Scottsdale* v. *National Cable TV Corp.* and *Cablevision of Winston-Salem* v. *Winston Salem,* cases, *supra,* indicate that local control may be considered, and BCC has indicated its desire that local control be a factor in the decision, the anti-competitive consequences of insisting upon local control require further study before that matter can be clearly determined. The other issues, including maximum price restraints, public access requirements, assignment and merger prohibitions, minimum building-out requirements, financial requirements, buy-back

arrangements, etc., all need to be examined carefully from both an authority and antitrust perspective in order to assure the enforceability of the permit.

The City Council has not discussed the question of whether a franchise would be appropriate rather than a permit. Although the City Charter and the statutes are permissive, non-exclusivity and the retention of a right of revocation may be sufficient to take cable television out of the franchise area under cases such as *Finney* v. *Estes*, 273 P.2d 638, Colo. (1954). The City Council should consider the possibility of proceeding in conformance with Sections 108 through 126 of the Charter, particularly in the event that a decision is made that the TCI permit should be revoked or limited. *Cf.* PUC Decision No. 70749 (1968).

In the memorandum presented by the Library Director to the City Manager and the City Council last Thursday and dated November 27, 1979, the recommendation was made that the City Council, together with the City Attorney, study what steps should be taken with regard to expansion of the present cable communications system operated by TCI during the selection process and thereafter. At the same meeting, BCC had presented a letter dated November 28, 1979, at which it suggested that: "no company will bid knowing that TCI is building while it is bidding. The economics of cable are such that once TCI were to build a system, no other company could compete." Subsequent to the meeting, inquiries were made of the cable communications operators which have expressed interest in building a system in Boulder. Of five companies which were polled, two indicated that they would be interested in submitting a bid in an open competitive situation, with no restrictions on the activities of the current permit holder. Three of five companies indicated they would be interested in submitting a bid if a formal bidding process were pursued, but again nothing was done to restrict the activities of the present permit holder. Only if the activities of the present permit holder were restricted in the period after bidding process would all five of the firms contacted be willing to submit a bid. This evidence is certainly equivocal and does not give the City Council very much guidance upon which to proceed.

In order to give the City Council the full scope of the antitrust problems raised, I am enclosing with this memorandum a copy of the September 27, 1979 letter of the Attorney General, a copy of an October 22, 1979, memorandum prepared by Dawson, Nagel, Sherman & Howard, Esqs., critiquing the Attorney General's letter and a copy of an article from the Urban Lawyer entitled "Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity after the *City of Lafayette* decision", by Hugh F. Bangasser. I would urge that these materials be consulted in order to study the kinds of difficulties which the City will be facing in the cable communications area, as well as in other areas following the *City of Lafayette* decision. It is clear that the fact that a particular activity may constitute a "natural monopoly" may not be sufficient in and of itself to allow a municipal corporation to act to insure that the monopoly act in the public interest. Perhaps a greater justification can be found for a municipal corporation acting to insure competition under such circumstances, but such activities may or may not be ultimately successful. Finally, the real issue in this case is not the construction of a cable to wire the City of Boulder but rather to preserve the first amendment rights of the citizens of the City to a free marketplace of ideas. In that regard, much further discussion will be required in order to develop an effective regulatory structure which comports with the extraordinary legal constraints in this area.

JNdR/mar
Attachments

January 11, 1980

RE: Boulder Cable Communications
Permit Application Process

Dear Sir:

The City of Boulder is pleased to invite your firm to apply for a permit to build a modern cable communications system to serve the citizens of this City.

There is currently in effect a permit to operate a cable TV system in Boulder. The Grantee is a wholly owned subsidiary of Community Tele-Communications, Inc. (TCI). TCI bought the system in 1966. The current permit will expire in 1984. It is both non-exclusive and revocable. A small shadow area of the City is currently being provided improved reception services by TCI under the present permit.

The City of Boulder desires to introduce competition into the Boulder marketplace for cable communications services. Consequently, on December 4, 1979 the City Council directed the City Manager to initiate an abbreviated selection process. On December 18, 1979 the City Council enacted a 90-day moratorium on cable television construction in Boulder to permit a competitive process to take place.

Please find enclosed a datasheet containing basic information about the City, an application form, and a draft of the City's cable communications permit ordinance. At its January 8, 1980 meeting, the City Council approved these documents in principle. The ordinance has not been adopted. It is understood that industry comments and suggestions may lead to modifications of the ordinance prior to its final adoption.

If your firm is interested in submitting an application, the following procedures shall be followed:

1) Complete the application form. Follow the format as closely as possible. Use marginal tabs to indicate each of the major sections.

If a form does not provide sufficient space, it may be retyped so long as all of the original questions are repeated. Re-number the pages of the completed application to ensure that every page has a number.

2) Insert any comments or suggestions regarding the draft cable communications permit ordinance in the application as Section 10.

3) Submit 20 copies of the completed application form to the City Clerk, Municipal Building, Boulder, Colorado by 3:00 p.m., Friday, February 29, 1980. Copies may be mailed to the City Clerk, P.O. Box 791, Boulder, Colorado 80306 as long as they arrive on or before the required date and time.

4) An application fee in the amount of one thousand dollars ($1,000.00) shall accompany the application form. This fee shall be in the form of a certified check or money order made payable to the City of Boulder.

Applicants will be evaluated according to the following criteria:

a) Financial soundness and capability. The evidence of financial capability furnished in each applicant's proposal must be such as to assure ability to complete the proposed system in the promised period of time.

b) Installation plan. All other things being equal, preference may be given to applicants with an installation plan providing for a rapid build out of a comprehensive cable communications system throughout the City of Boulder. Preference may also be given to applicants with an installation plan providing flexibility to adjust to new developments in cable technology.

c) Maintenance. All other things being equal, preference may be given to applicants with aggressive maintenance and repair practices and services.

d) Rate schedules. All other things being equal, preference may be given to applicants with reasonable installation and subscriber rate schedules, including future rate formulas which guarantee continued reasonable rates.

e) Demonstrated experience in operating a cable communications system. All other things being equal, preference may be given to applicants with experience in operating other cable communications systems. Such experience may include experience of the applicant's employees.

f) Service package. All other things being equal, preference may be given to applicants with the most attractive service package or packages, including plans and proposals for interconnection with other systems and services.

g) Other criteria. The City Council may consider other criteria which directly affect the ability of applicants to provide "state-of-the-art, community-service-oriented, cable communications services to the people of the City of Boulder".

Since the application form will be adopted and made a part of any cable communications permit ordinance, applicants should take special care to avoid making any unrealistic promises. Failure to perform in accordance with promises made in the application form may subject the Grantee to fines or other penalties, including revocation of the permit.

We look forward to receiving an application from your firm. If you have any questions regarding the procedures or any other matter, please feel free to write Mr. Richard Varnes, Director, Media Center, Boulder Public Library, P.O. Drawer H, 1000 Canyon Boulevard, Boulder, Colorado 80306, or telephone 303/441-3105.

Very truly yours,

ROBERT G. WESTDYKE
CITY MANAGER

RGW/cd
Enclosures

ORDINANCE NO.

AN ORDINANCE GRANTING A NON-EXCLUSIVE REVOCABLE PERMIT TO FOR THE CONSTRUCTION, ERECTION, OPERATION, MAINTENANCE AND REPAIR OF A CABLE COMMUNICATIONS SYSTEM IN THE CITY OF BOULDER, COLORADO; PERMITTING THE GRANTEE TO MAKE USE OF PUBLIC STREETS, ALLEYS, UTILITY EASEMENTS, AND, WITHOUT LIMITATION, ANY OTHER WAYS AND PLACES WITHIN THE CITY OF BOULDER FOR A PERIOD OF FIFTEEN YEARS; AND SETTING FORTH CONDITIONS AND DETAILS IN RELATION THERETO.

WHEREAS, it is the intent of the City Council of the City of Boulder, Colorado, to grant a 15-year, non-exclusive revocable permit to construct, erect, operate, maintain and repair a state-of-the-art, community-service-oriented cable communications system to
(the "Grantee"); to define the contractual relationship between the Grantee and the City; to ensure access to the system for a wide spectrum of potential programmers; and to provide for flexibility to accommodate future regulatory and economic developments;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO, THAT:

SECTION 1. SHORT TITLE.

This ordinance shall be known and may be cited as the "Boulder Cable Communications Permit Ordinance for
".

SECTION 2. DEFINITIONS.

For the purposes of this ordinance, the following words and terms shall have the meanings given herein:

(a) *"City of Boulder" or "City"* means all of the territory within the present and future corporate boundaries of the City of Boulder, Colorado.

(b) *"City Manager"* means the City Manager of the City of Boulder, or his authorized representative.

(c) *"City Council"* means the governing body of the City of Boulder.

(d) *"cable communications system,"* or *"system"*, sometimes referred to as *"cable tv system"*, *"catv system"*, or *"broadband communications network"*, means a system of antennas, towers, satellite earth stations, coaxial cable, amplifiers, microwave, fiber optics, waveguides, laser beams, conductors, converters, or, without limitation, any other facility, equipment, or other property constructed, erected, installed, or placed, in whole or in part, in, upon, over, under, across, or along any of the public streets, alleys, utility easements, or, without limitation, any other ways or places within the City of Boulder for the purpose of producing, receiving, transmitting, amplifying, storing, processing, or distributing audio, video, digital, or, without limitation, any other signals.

(e) *"Grantee"* means

(f) *"subscriber"* means a person or entity who or which elects to receive, for any purpose, a service provided by means of, or in connection with, the cable communications system authorized hereby.

(g) *"programmer"* means a person or entity who or which produces, brokers, sells, or, without limitation, otherwise provides program material for transmission, either live or from recorded media, by means of, or in connection with, the cable communications system authorized hereby.

SECTION 3. GRANT OF PERMIT.

(a) *Permission to Use Public Streets and Ways.*

Upon the effective date of this ordinance, and during the term hereof, the Grantee shall have the privilege and responsibility, subject to the conditions hereof, to construct, erect, operate, maintain, and repair, in, upon, over, under, across, and along the public streets, alleys, utility easements, and, without

limitation, any other ways and places within the City, such equipment and facilities as are necessary and appurtenant to the operation of a state-of-the-art, community-service oriented cable communications system.

(b) *Permit Non-Exclusive.*

The permit herein granted for the purpose herein set forth shall not be exclusive, and the City Council reserves the right to grant any similar or other permit to use said public streets, alleys, utility easements, and, without limitation, any other ways and places, to any person at any time during the term hereof; provided, however, that nothing contained herein shall be deemed to require the granting of additional permits if, in the opinion of the City Council, it is not in the public interest to do so.

(c) *Term.*

The term hereof, and all rights, privileges, obligations and restrictions pertaining hereto, shall be fifteen years from the effective date hereof, unless terminated or revoked sooner as herein provided.

(d) *Revocation.*

The City Council reserves the right to revoke this permit, and all privileges pertaining hereto, at its pleasure and discretion, at any time, without cause and without compensation to any person or entity, and no vested right shall accrue hereunder to the Grantee or any subscriber or programmer or any other person or entity, except for the City.

SECTION 4. OWNERSHIP AND CONTROL.

(a) *Direct and Indirect Transfers of Control.*

The permit granted hereby may not be assigned, sold, transferred or encumbered, nor may the Grantee merge with or combine with any other person or entity or contract with any other person or entity for the operation or maintenance of the cable communications system authorized hereby, unless the trans-

action is first approved by the City Council, by resolution, after a public hearing. However, in the case of an encumbrance, the City Manager may approve the transaction without a public hearing upon a determination that the transaction is purely a security transaction not designed to indirectly effect a sale. A shift of stock or other ownership or control of the Grantee shall be considered an assignment of the permit (1) if a transaction or series of transactions involves the acquisition of 10% or more of the ownership or control of the Grantee by any person, entity or group; or (2) if a transaction or series of transactions will result in any acquiring person, entity or group having 50% or more of the ownership or control of the Grantee, whose combined ownership or control, prior to the transaction or series of transactions is less than 50% of the total ownership or control. Absent extraordinary circumstances, the City Council shall not approve any transfer or assignment of this permit prior to completion of construction of the cable communications system authorized hereby.

(b) *Receivership, Foreclosure, and Similar Situations.*

The permit granted hereby may, at the option of the City Council, be terminated upon the appointment of a receiver or receivers or trustee or trustees to take over or conduct the business of the Grantee, whether in a receivership, reorganization, bankruptcy or other legal action or proceeding.

(c) *Right of City to Purchase System.*

(1) Upon the termination hereof, or upon any breach hereof by the Grantee, the City may, at its election, and upon the payment to the Grantee of a price equal to the fair market value of the physical assets of the cable communications system, as of the date of the taking, purchase and take over the system. The price shall not reflect or include, and the Grantee shall not receive, payment for any right or privilege or good will derived herefrom or hereunder; provided,

however, that the City Council shall have the right unilaterally to increase the purchase price provided for above, should it so elect, by an ordinance amendatory hereto; but such right shall not be construed as giving the Grantee a right to any price in excess of that set forth above. Upon the exercise of this option by the City and its delivery of an official notice of such action to any agent or employee of the Grantee, the Grantee shall immediately transfer to the City possession of all facilities, equipment and other property, real and personal, of the cable communications system authorized hereby, free from any and all liens and encumbrances not agreed to be assumed by the City in lieu of some portion of the purchase price set forth above. The Grantee shall execute such warranty deeds, bills of sale, and other instruments of conveyance to the City as shall be necessary for this purpose, upon the City's agreement to tender the purchase price set forth herein within a reasonable time, as determined by the City Council.

(2) The Grantee shall make it a condition of each contract, permit, authorization, consent or waiver obtained by or entered into by it with reference to its operations hereunder that the City shall have the right to succeed to all rights and privileges thereof upon the exercise of any right or privilege provided to the City hereunder.

(3) To protect the interest of the City hereunder, and in order that the City may exercise any right or privilege provided hereunder, the Grantee shall not make, execute or enter into any deed, deed of trust, mortgage, contract, conditional sales contract or any loan, lease, pledge, sale, pole agreement or any other agreement concerning any of the facilities, equipment or other property, real or personal, of the cable communications system authorized hereby, without the prior written approval of the City Manager. That approval shall be given unless the proposed transaction would, in the City Manager's judgment, adversely

affect the rights and interests of the City of Boulder or the people of the City of Boulder. The City Manager's action shall be subject to review by the City Council, at the request of the Grantee.

SECTION 5. RATES.

(a) *Schedule of Rates.*

The initial schedule of rates, rentals, and charges shall be as set forth in the Grantee's proposal, including the specified installation and monthly charges for providing subscriber services to residential, commercial, and agency subscribers. The Grantee shall file an amended schedule with the City Clerk at least thirty days prior to any change, and any change in any rate, rental, or charge may be delayed by action of the City Council at any time. All rates, rentals, and charges shall be non-discriminatory and uniform to all persons and organizations of like classes under similar circumstances and conditions. Nothing contained in this subsection shall be construed to prohibit the reduction or waiving of charges in conjunction with promotional campaigns for the purpose of attracting subscribers or programmers, nor shall this subsection be interpreted to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any subscriber or programmer included within a particular classification shall be entitled.

(b) *Regulation of Changes in Rates.*

The City reserves the right, at its option and sole discretion, to regulate Grantee's rates at such time as the City Council determines that such regulation is in the best interest of the City of Boulder or the people of the City of Boulder, notwithstanding any rate or rate formula previously agreed upon or acquiesced to.

(c) *Advance Charges and Deposits.*

The Grantee may require subscribers to pay a deposit for converters and for connection to the cable

communications system authorized hereby and to pay for each month of subscriber services in advance at the beginning of each month. No other advance payment or deposit of any kind shall be required by the Grantee for subscriber services.

(d) *Disconnection and Reconnection.*

There shall be no charge for disconnection of any connection to the cable communications system authorized hereby. If any subscriber fails to pay a properly due monthly subscriber fee, or any other properly due fee or charge, the Grantee may disconnect the subscriber's connection to the cable communications system authorized hereby. Such disconnection shall not be effected until sixty days after the date of accrual of said delinquent fee or charge, and until at least ten days after reasonable written notice of intent to disconnect has been mailed to the subscriber in question. After disconnection, upon the payment of any delinquent fee or charge and the payment of the reconnection charge, if any, the Grantee shall promptly reinstate the subscriber's cable service.

(e) *Service to Multi-Family Units.*

The subscriber rates and charges imposed by the Grantee with respect to service to multi-family units shall not be increased or affected either directly or indirectly by reason of any payment or payments which the Grantee may make to the owner of any multi-family unit or any other person for the privilege of installing service or access to such multi-family units.

SECTION 6. GENERAL FINANCIAL AND INSURANCE PROVISIONS.

(a) *Payment to the City.*

(1) In consideration for authorization to construct, erect, operate, maintain and repair a cable

communications system hereunder, the Grantee shall pay to the City during the term hereof five percent of the Grantee's total gross revenues attributable to operations hereunder.

(2) Payments due to the City under this Section shall be computed quarterly, for the preceding quarter, as of March 31, June 30, September 30, and December 31. Each quarterly payment shall be due and payable not later than thirty days after the said dates. Each payment shall be accompanied by a brief report showing the basis for the computation and such other relevant facts as may be required by the City Manager.

(3) No acceptance of any payment shall be construed as an acquiescence that the amount paid is in fact the correct amount, not shall such acceptance of payment be construed as a release of any claim which the City may have for further or additional sums payable under the provisions hereof. All amounts paid shall be subject to audit and recomputation by the City.

(b) *Indemnification.*

(1) The Grantee shall indemnify and hold harmless the City of Boulder, the City Council, the City Manager and any agent or employee thereof at all times during the term hereof and specifically agrees that it will pay all damages and penalties which the City, the City Council, the City Manager or any agent or employee thereof may be legally required to pay as a result of granting this permit or any action or activity undertaken by any person or entity hereunder. Such damages and penalties shall include, without limitation, damages arising out of copyright infringements, or otherwise arising out of the construction, erection, operation, maintenance and repair of the cable communications system authorized hereby, whether or not any act or omission complained of is authorized, allowed or prohibited hereby. If legal action is filed,

either independently or jointly with the Grantee, to recover for any claim or damages covered by this indemnification, the Grantee, upon request to it by the City Council, shall defend the action and, in the event of a final judgment being obtained, the Grantee shall pay the judgment and all costs and hold the City, the City Council, the City Manager and any agent or employee thereof harmless therefrom.

(2) The Grantee shall pay and specifically agrees that it will pay all expenses incurred by the City in defending with regard to all damages and penalties as set forth in subsection 6(b)(1). These expenses shall include, without limitation, all out-of-pocket expenses, such as, without limitation, attorneys' fees and witness and discovery costs and expenses, and shall also include the reasonable value of any services rendered by the City Attorney, his assistants and other agents and employees of the City.

(c) *Surety Bonds.*

(1) The Grantee shall, concurrently with its acceptance of this permit, file with the City Clerk a corporate surety bond or bonds from a responsible company licensed to do business in Colorado in the amount of $250,000.00, assuring compliance by the Grantee with all terms and conditions hereof and providing that in the event that the Grantee should fail to comply with any term or condition hereof, or any term incorporated herein, there shall be recoverable, jointly and severally, from the amount of such bond, any damages or loss suffered by the City of Boulder or the people of the City of Boulder as a result thereof, as determined by the City Council, including, without limitation, the full amount of any compensation, indemnification or cost of removal or abandonment of any property of the Grantee, plus attorneys' fees and witness and discovery costs and expenses and the reasonable value of any services rendered by the City Attorney, his assistants and any

other agents and employees of the City. The bonds may be reduced in pro rata increments as construction requirements are completed, in the discretion of the City Council.

(2) All bonds provided by the Grantee pursuant hereto shall provide that at least thirty days prior written notice shall be given to the City by filing the same with the City Clerk in the event of any material alteration, cancellation or non-renewal of any portion of such bonds. Copies of all such bonds shall be furnished to and filed with the City Clerk, prior to the commencement of operations hereunder, and all amendments shall likewise be filed with the City Clerk, immediately upon execution.

(d) *Insurance.*

(1) The Grantee shall be required to maintain insurance in such forms and with such companies as shall be approved by the City Manager, such approval not to be unreasonably withheld, to protect the City, the City Council, the City Manager and any agent or employee thereof and the Grantee from and against any and all claims, injury or damage to persons or property, both real and personal, caused by the construction, erection, operation, maintenance or repair of any aspect of the cable communications system authorized hereby. The amount of such insurance shall be not less than the following:

General Liability Insurance	
Bodily injury per person	$ 150,000
Bodily injury per occurrence	400,000
Property damage per occurrence	400,000
Automobile Insurance	
Bodily injury per person	400,000
Bodily injury per occurrence	1,000,000
Property damage per occurrence	400,000

(2) Workmen's Compensation Insurance shall also be provided by the Grantee to its employees, as

required by the laws of the State of Colorado, as amended.

(3) All insurance policies shall provide that at least ten days prior written notice shall be given to the City by filing the same with the City Clerk in the event of any material alteration, cancellation or nonrenewal of any coverage afforded in such policies. Copies of all such policies shall be furnished to and filed with the City Clerk, prior to the commencement of operations hereunder, and all amendments shall likewise be filed with the City Clerk, immediately upon execution.

(e) *Effect of Bond and Insurance Limitations.*

Neither any bond or bonds nor any insurance policy or policies required or accepted by the City pursuant hereto, nor any damage recovered by the City thereunder, shall be construed to excuse unfaithful performance by the Grantee or limit the liability of the Grantee for damages, either to the full amount of the bonds of policies, or otherwise.

SECTION 7. DESIGN AND CONSTRUCTION PROVISIONS.

(a) *Interconnections.*

The Grantee may interconnect the cable communications system with all other contiguous cable communications systems, and the Grantee may interconnect with any other system or service.

(b) *Leased Access Channels.*

The Grantee shall provide a minimum of five video channels available for lease on a first-come first-served basis, at fair and published rates. Channels shall be made available for lease on an entire-channel basis or on a time-shared basis. Access to leased channels shall not be unreasonably denied. If the Grantee denies access to the headend and distribution system, or does not establish a fair and published rate in a timely manner upon request, the City Manager

may require such access or find the Grantee in breach hereof and take further steps hereunder. Nothing in this provision shall be construed to prohibit the Grantee from adding to the minimum number of leased channels, at the discretion of the Grantee.

(c) *Construction Standards and Requirements.*

(1) All of the Grantee's facilities, equipment and other property employed in any manner in the cable communications system authorized hereby shall be located, constructed, erected, operated, maintained and repaired in accordance with good engineering practices, by experienced poleline construction crews and so as not to endanger or interfere with the safety of any persons or property, or to interfere with any improvements which the City may deem proper to make, or to interfere in any manner with the rights of any property owner, or to unnecessarily hinder or obstruct pedestrian or vehicular traffic; further, all such plant and equipment and all construction shall meet all relevant specifications of the Federal Communications Commission, and other applicable Federal, State and City laws, ordinances, rules, regulations and requirements.

(2) The Grantee shall not erect, for any reason, any pole in the City of Boulder, except as may be reasonably required or necessary to fill small gaps in the existing aerial utility system, and then only with the advance written approval of the City Manager. The City shall actively assist the Grantee to the fullest extent practicable in obtaining reasonable joint pole or conduit use agreements from the owners of existing poles or conduits.

(3) Any opening or obstruction in or disturbance of any of the streets, alleys or public ways of the City made by the Grantee in the exercise of its privileges hereunder shall be done in strict compliance with the regulations and requirements of the City Manager.

(4) The Grantee shall locate the cable communications system authorized hereby in tandem with the

existing utility system, either aerial or underground, and shall share in the cost and use of underground facilities upon conversion of the existing aerial system.

(5) The Grantee shall, at its expense, protect, support, temporarily disconnect, reconnect, relocate in the same street or other way or place, or otherwise adjust any property of Grantee as required by the City Manager by reason of traffic conditions, public safety, street vacation, freeway, street or sidewalk construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines or tracks, or any other public work or improvement.

(6) The Grantee shall, on the request of any private party holding an appropriate permit issued by the City, and after a minimum of forty-eight hours prior notice, temporarily raise or lower its lines to permit the moving of any building or other structure, and the actual expense of the same shall be paid by the party requesting the same.

(7) Upon failure of the Grantee to commence, pursue or complete any work required hereby or by any term incorporated herein within the prescribed time, and to the satisfaction of the City Manager, the City Manager may, at his option, cause such work to be done. The Grantee shall pay to the City the cost of such work as submitted to the Grantee in itemized amounts. Payment shall be made within thirty days after receipt of the itemized report.

(d) *Technology Level Requirements.*

The Grantee shall upgrade its facilities, equipment and services so that the cable communications system authorized hereby is as advanced as the current state of production technology will allow, but at no time shall the Grantee be required to upgrade its facilities if it demonstrates that such upgrading would

not be financially feasible or in the best interest of the City of Boulder or the people of the City of Boulder.

(e) *Emergency Alert and Use of Facilities.*

The cable communications system shall be engineered to provide an alert system to allow authorized officials to automatically override or supplement the signal on all channels and transmit and report emergency information. The Grantee shall, in the case of an emergency or disaster, make the entire system available without charge to the City or to any other governmental or civil defense agency that the City Manager may designate. The determination as to what shall constitute an emergency for the purposes of this subsection shall be made by the City Manager.

(f) *Standby Power.*

The Grantee shall install and maintain equipment capable of providing standby power for headend and trunk amplifiers for a minimum of two hours.

(g) *Accident Prevention Measures.*

The Grantee shall, at all times, employ ordinary care and install and maintain in use commonly accepted methods and devices to prevent failures and accidents which are likely to cause any damage, injury or nuisance of any kind.

(h) *Damage Repairs.*

Any damage caused to the property of any person or entity by any act or omission of the Grantee shall be repaired and compensated fully by the Grantee.

(i) *Permission of Property Owner Required.*

No cable, line, amplifier, converter, or, without limitation, other piece of equipment owned by the Grantee shall be installed without first securing written permission of the owner of any property involved. If such permission is later revoked, whether by the original or a subsequent owner, the Grantee shall at its

expense forthwith remove any equipment and promptly restore the property to its original condition or to a condition acceptable to the property owner, whichever is less.

SECTION 8. MAINTENANCE AND COMPLAINT PROCEDURE.

(a) *Maintenance.*

(1) The Grantee shall construct, erect, operate, maintain and repair all parts of the cable communications system authorized hereby in good condition throughout the entire term hereof.

(2) The Grantee shall render efficient service, make repairs promptly, and interrupt service only for good cause and for the minimal amount of time necessary. Such interruption, insofar as possible, shall be preceded by notice and shall occur during periods of minimum use of the cable communications system.

(3) The Grantee shall maintain an office in the City of Boulder which shall be open to the public during all normal business hours, have a publicly listed toll free telephone number, and be so operated that complaints and requests for repairs or adjustments may be received on a twenty-four hour basis. Written logs shall be maintained of all service interruptions and all complaints and their disposition and shall be forwarded quarterly to the City Manager for review.

(b) *Continuity of Service.*

It shall be the right of all subscribers to receive all available services insofar as their financial and other obligations to the Grantee are honored. In no event shall the Grantee discontinue operation of any part of the cable communications system authorized hereby as a result of any disagreement or problem with the City of Boulder, the City Council, the City Manager, any subscriber, or any other person. Upon any such discontinuation, the City shall have, in addition to the

right to seek all appropriate compensatory and other damages and equitable relief to enforce the provisions hereof, and of all terms incorporated herein, and the other rights and prerogatives provided herein, the right to purchase the system pursuant to subsection 4 (c) hereof.

(c) *Complaint Procedure.*

The City Manager shall have the responsibility for receiving and investigating those complaints regarding the performance of the Grantee which the Grantee has been unable to resolve to the satisfaction of any subscriber or potential subscriber. If the City Manager finds that the Grantee has failed promptly to perform pursuant to the terms hereof, the City Manager may require the Grantee to take such corrective action as may be deemed appropriate under the circumstances. Upon a failure by the Grantee promptly to undertake and complete such corrective action to the satisfaction of the City Manager, the City Manager may, in writing, declare the Grantee in breach of the terms of this Section and assess the Grantee as provided in subsection 8 (d) hereof.

(d) *Assessments.*

For failure of the Grantee to comply with corrective action required by the City Manager as set forth above, the Grantee shall pay to the City, as liquidated damages and not as a penalty, One Hundred Dollars per day for each day, or part thereof, that such noncompliance continues.

(e) *Letter of Credit.*

For the purpose of assuring compliance herewith, and with every term incorporated herein, the Grantee shall maintain a $5,000.00 letter of credit, in a form acceptable to the City Attorney of the City of Boulder, payable to the City as beneficiary during the entire term hereof. The Grantee shall restore the credit to a full $5,000.00 within thirty days after notification by the City of any withdrawal.

(f) *Right of Appeal to City Council.*

The Grantee may, within ten days after notification by the City of a withdrawal from the letter of credit set forth above, request the City Manager in writing to reconsider the penalty assessment. The City Manager shall respond in writing to a request for reconsideration, and may take such action as is deemed appropriate under the circumstances. The Grantee may appeal the decision of the City Manager to the City Council by mailing notice in writing within ten days of the date of the City Manager's response to the Grantee's request for reconsideration. The City Council may accept, reject, or modify the decision of the City Manager.

(g) *Prohibition of Passing Along Assessments to Subscribers.*

The subscriber rates and charges imposed by the Grantee shall not be increased or affected either directly or indirectly by reason of any payment or payments which the Grantee may be required to make to the City pursuant to this Section.

SECTION 9. RECORDS AND REPORTS.

(a) *Filings and Communications with Regulatory Agencies.*

Copies of all petitions, applications, complaints, orders and other communications exchanged between the Grantee and the Federal Communications Commission, or any other Federal or State regulatory commission or agency having or asserting jurisdiction with respect to any matters affecting the cable communications system authorized hereby, shall be submitted immediately to the City Manager.

(b) *Permits and Authorizations.*

The Grantee shall diligently seek all necessary permits, authorizations, consents and waivers required

by the conduct of its business, including, without limitation, necessary pole attachment contracts, necessary authorizations from the Federal Aviation Agency to construct such receiving antenna towers as may be required, and necessary authorizations or waivers from the Federal Communications Commission, and when any such permit, authorization, consent or waiver is requested or obtained or questioned in any manner, a copy of the communication shall be submitted immediately to the City Manager.

(c) *Reports.*

(1) The Grantee shall file quarterly with the City Manager reports of gross revenues signed by a certified public accountant. The Grantee shall also allow the City Manager to audit all of its accounting and financial records; all of its contracts and engineering, statistical, customer and service records; and all other records required to be kept hereunder. The Grantee shall at all times maintain complete and accurate books of account, records of its business and operations and other records required hereunder.

(2) The Grantee shall file annually with the City Manager a detailed plan showing the location of all portions of the cable communications system located within the City of Boulder.

(3) The Grantee shall also file annually with the City Manager an ownership report, indicating all persons, entities or groups who at any time during the preceding year controlled or benefitted from an interest in the Grantee or this permit of one percent or more and all creditors, secured and unsecured, to which the Grantee is obligated, in excess of one thousand dollars.

(4) The Grantee shall also file annually with the City Manager immediately upon their effectiveness with regard to any subscriber, copies of all rules, regulations, terms and conditions which it has adopted for the conduct of its business.

(d) *Subscribers' Right to Privacy.*

Neither the City, the Grantee, nor any programmer shall disclose personally identifiable information about any subscriber without the consent of the subscriber. The possibility of abuse in this area shall be discussed at every scheduled renegotiation session, as provided in subsection 10 (c) hereof. The Grantee shall not sell, or otherwise make available, lists of names and addresses of its subscribers, or any personally identifiable information concerning its subscribers or their viewing habits, to any person or entity, for any purpose whatsoever.

SECTION 10. RENEGOTIATION PROVISIONS.

(a) *Intent.*

In recognition of the fact that a great many regulatory, technical, financial, marketing, and political uncertainties are associated with all aspects of cable communications at the present time, it is the intent of the City to provide for the maximum feasible degree of flexibility in this permit throughout its term. The principal means for accomplishing this flexibility will be the scheduled renegotiation sessions provided for in this Section. It is intended that such renegotiation sessions will serve as a means of cooperatively working out solutions to problems that develop.

(b) *Scheduled Renegotiation Sessions.*

The Grantee and the City shall hold scheduled renegotiation sessions, on or about the second, fourth, seventh, tenth and thirteenth anniversaries of the effective date hereof.

(c) *Topics to be Negotiated.*

The following topics shall be discussed at every scheduled renegotiation session: rate structures, free or discounted services, application of new technologies, system performance and testing procedures, services provided and programming offered, extension

of service, subscriber complaints, privacy and human rights, community development and education, interconnection and judicial and regulatory Agency rulings. During the month preceding the scheduled renegotiation sessions, both parties shall specify the additional topics to be discussed. Topics in addition to those listed may be added by either party. Members of the general public may add topics by working through the negotiating parties.

SECTION 11. MISCELLANEOUS PROVISIONS.

(a) *Permit Agreement.*

Prior to the effective date hereof, the Grantee shall submit to the City a signed and notarized agreement which shall specifically state that the Grantee accepts and agrees to all of the provisions hereof. The permit agreement shall specifically state that any and all promises or proposals made to the City, the City Council, the City Manager and any agent or employee thereof, or any subscriber or programmer, at any time, by the Grantee or any agent or employee thereof, shall be incorporated herein and made a part hereof.

(b) *Prohibition of Discriminatory or Preferential Practices.*

Except as otherwise provided herein, the Grantee shall not, in making available the services or facilities of the cable communications system authorized hereby, or in its rules, regulations, terms or conditions, or in any other respect, make or grant preferences or advantages to any subscriber or potential subscriber to the system, or to any programmer or potential programmer seeking to use the system; and shall not subject any such person or entity to any prejudice or disadvantage. The entire cable communications system authorized hereby shall be operated in a manner consistent with the principle of fairness and equal accessibility of public access facilities, if any, equip-

ment, channels, studios and other services to all citizens, businesses, public agencies and other persons or entities having a legitimate use of the system; and no one shall be arbitrarily excluded from its use.

(c) *Compliance with Laws.*

The Grantee shall comply with all Federal, State and City laws, ordinances, resolutions, rules and regulations, heretofore or hereinafter adopted or established during the term hereof.

(d) *Right of Intervention.*

The City shall have the right of intervention in any suit or proceeding to which the Grantee is party. The Grantee shall not oppose, nor may it compel, such intervention by the City.

(e) *Right to Require Removal of Property.*

At the expiration of the term hereof, or upon revocation as provided herein, the City shall have the right to require the Grantee to remove, at its own expense, all portions and remnants of the cable communications system authorized hereby from the City of Boulder.

(f) *No Recourse Against the City.*

The Grantee shall have no recourse whatsoever against the City, the City Council, the City Manager, or any agent or employee thereof for any loss, cost, expense, or damage arising out of any provision or requirement hereof, the award hereof to the Grantee or, the enforcement hereof against the Grantee or any other person or entity whatsoever.

(g) *Non-enforcement by the City.*

The Grantee shall not be relieved of its obligations to comply with any of the provisions hereof by reason of any failure of the City to enforce prompt compliance.

(h) *Regulations.*

The City Manager may promulgate regulations necessary or convenient to the administration and enforcement hereof.

SECTION 12. SEVERABILITY.

If any one or more sections, sentences, clauses or parts of this ordinance shall, for any reason, be held invalid, the invalidity of such section, sentence, clause or part hereof shall not affect or prejudice in any way the applicability and validity of any other provisions hereof.

SECTION 13. EFFECTIVE DATE.

The effective date of this ordinance shall be

SECTION 14. REPEAL.

Ordinance No. 2846, as reenacted by ordinance No. 4474, is hereby repealed.

INTRODUCED, READ AND ORDERED PUBLISHED BY TITLE ONLY this day of A.D. 19 .

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED AND ADOPTED this day of A.D. 19 .

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

COMMUNITY COMMUNICATIONS, COMPANY, INC., a Colorado corporation, doing business as BOULDER CABLE T.V., *Plaintiff,*	
VS.	**COMPLAINT**
CITY OF BOULDER, COLORADO, a municipal corporation; BOULDER COMMUNICATIONS CO., a partnership; THOMAS CROSS, JACK KERNER, MICHAEL THOMPSON, DONALD PASSALACQUA, BARRY TELLEEN, and DENNIS DUBÉ, *Defendants.*	

Plaintiff Community Communications Company, Inc. (hereinafter "CCC"), a Colorado corporation, doing business as Boulder Cable T.V., brings this action against the City of Boulder, Colorado, a municipal corporation (hereinafter "Boulder"), and other defendants, and alleges as follows:

FIRST CLAIM FOR RELIEF
INJUNCTION—VIOLATION OF THE FIRST AMENDMENT

1. This is an action to redress the deprivation under color of an ordinance of the rights secured to plaintiff by the First, Fifth, and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. § 1981, and is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1343 and 1331. The amount in controversy exceeds $10,000, exclusive of interest and costs.

2. Defendant Boulder is a municipal corporation located within the District of Colorado; the violations of law herein described have been and are being performed within the District of Colorado; and the resulting injury to plaintiff has been and is being suffered within the District of Colorado.

3. Plaintiff CCC at all times herein mentioned was, and now is, a corporation in good standing existing under and by virtue of the laws of the State of Colorado. CCC was and is the lawful owner and operator of a cable television system (hereinafter sometimes referred to as a "CATV" system) within the City of Boulder, State of Colorado.

4. Defendant Boulder was at all times herein mentioned, and now is, a municipal corporation existing under and by virtue of the laws of the State of Colorado, acting in its proprietary capacity.

5. On information and belief, Defendant Boulder Communications Co. is a partnership formed to establish and operate a cable television system in Boulder, Colorado.

6. On information and belief, Defendants Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen, and Dennis DuBé are partners in Boulder Communications Co. and residents of this district.

7. A cable television system is not a public utility. A cable television system is a disseminator of news, information, and entertainment. It disseminates the foregoing either (1) rebroadcasting signals originating at commercial or public broadcasting stations; (2) transmitting programming specialty produced for cable television systems and not available on commercial and public broadcasting stations, but only to cable television subscribers; and (3) producing original programming in its own studios which is disseminated only to subscribers of cable television.

8. A cable television system consists of extensive equipment, including central receiving stations, called headends; earth satellite receiving station; amplifiers; and a wire distribution system consisting of wire facilities to each subscriber running over public and private property pursuant to rights obtained by contract.

9. On October 6, 1964, for good and valuable consideration, Boulder executed a contract with Colorado Televents, Inc., which gave Colorado Televents, Inc., the nonexclusive right to construct a cable television system over the public rights-of-way within the city. Ordinance No. 2846 (attached hereto as Exhibit A) incorporates the terms of that agreement.

10. The agreement, by its terms, was to exist for a period of 20 years from the date of enactment of the ordinance.

11. On August 1, 1966, with the prior consent of Boulder, Colorado Televents, Inc., for good and valuable consideration, assigned all its rights and interests pursuant to its agreement with Boulder contained in Ordinance No. 2846 to CCC.

12. By virtue of this assignment, CCC obtained the nonexclusive right, among others, to build, operate, and maintain a CATV system within and throughout the entire City of Boulder as it existed at the time of the grant of the permit and as it would exist in the future. Additionally, by virtue of this permit CCC also obtained a property interest in Boulder's real property, *i.e.*, the nonexclusive right to use Boulder's present and future streets and rights-of-way for the operation of the CATV system.

13. At the time of the assignment, Boulder was aware of CCC's need to make a substantial investment in the cable television system, that substantial portions of said investment were made for the purpose of serving a distribution system covering the entire City of Boulder as well as adjacent unincorporated areas, and Boulder was further aware that CCC would need substantial time to recover its investment.

14. In reliance upon Boulder's express approval of the above-referenced assignment and the resulting relationship between CCC and Boulder, CCC paid substantial sums of money to Colorado Televents, Inc., to acquire said CATV system, and thereafter expended additional and substantial sums of money to maintain, upgrade, extend, and improve said system. In reliance upon the aforesaid, CCC has invested a sum in excess of $1,000,000.

15. During May 1979, defendants became aware of plaintiff's intent to complete its distribution system. Thereafter

and unbeknown to plaintiff, defendants Boulder Communications Co., Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen, and Dennis DuBé formed the desire and intent to operate a CATV system in Boulder, and, in an effort to avoid competition with plaintiff, and to gain an illegal and unfair advantage, conspired with Boulder to prevent plaintiff from the exercise of its lawful business as a disseminator of news, information, and entertainment.

16. On December 18, 1979, in breach of its contractual obligation, and for the purpose of accomplishing the purpose of the conspiracy as above set forth, the City of Boulder, by and through its City Council, enacted an emergency ordinance. Said ordinance is attached hereto as Exhibit B and is incorporated herein as though fully set forth.

17. On December 18, 1979, the City of Boulder, by and through its City Council, introduced and, upon its first hearing, passed Ordinance No. 4472. This ordinance is attached hereto as Exhibit C and is incorporated herein by reference as though fully set forth.

18. These two ordinances attempt to rescind the agreement between CCC and Boulder permitting CCC to use Boulder's streets and rights-of-way to operate a cable television system throughout the entire City of Boulder, and replace that agreement with one restricting the exercise of CCC's rights to that area of Boulder presently served by CCC until at least March 18, 1980.

19. The express purpose of said ordinances was and is to prevent plaintiff from the lawful exercise of its business as a disseminator of news, information, and entertainment for at least three months, if not permanently; and to give the individual defendants a competitive advantage over plaintiff.

20. The express purpose of Boulder's actions in terminating or revoking CCC's permit and restricting CCC's permit and restricting CCC's right to do business to a limited geographical area is to specifically preclude CCC from disseminating news, information, entertainment, and ideas and to expressly favor the individual defendants as an alternative speaker. Boulder's described ordinances and their intended purpose on their face

and as intended to be applied violate the guarantees of freedom of speech and press.

21. Boulder's said actions and the resulting interference with CCC's constitutional rights, if allowed to be continued, will cause irreparable injury.

22. By reason of Boulder's above-described actions, CCC's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution have been violated and infringed. CCC has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable injury to its constitutional rights. Unless Boulder is enjoined from barring or otherwise interfering with CCC's rights to freedom of speech and press, CCC will continue to suffer great and irreparable injury as aforesaid.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
INJUNCTION—VIOLATION OF EQUAL PROTECTION

23. CCC incorporates by reference Paragraphs 1 through 22 as if fully set forth herein, and further alleges as follows:

24. Boulder's actions preclude CCC from exercising its freedoms of speech and press in other than the area of Boulder presently served by CCC. This governmental preference for one speaker over another violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, and 42 U.S.C. § 1981.

25. Boulder's said actions and the resulting interference with CCC's constitutional rights have resulted and will continue to result in irreparable injury to CCC.

26. CCC has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable injury to its constitutional rights. Unless Boulder is enjoined from barring CCC only from exercising its rights to

freedom of speech and press in certain areas of the city, CCC will continue to suffer great and irreparable injury as aforesaid.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF
INVERSE CONDEMNATION

27. CCC incorporates by reference Paragraphs 1 through 26 of the First and Second Causes of Action as if fully set forth herein, and further alleges as follows:

28. The agreement permitted Colorado Televents, Inc., and its assignee, CCC, to erect its cable television distribution system over Boulder's rights-of-way for a period of at least 20 years.

29. The right to construct these facilities is a valuable property right of CCC.

30. CCC has affixed parts of its cable television system to the real property consisting of Boulder's rights-of-way.

31. Passage of the ordinance attached hereto as Exhibits B and C effected a taking of CCC's contract right to provide cable television service throughout Boulder, including those areas of Boulder not presently served by CCC, and has deprived CCC of the value of its facilities affixed to Boulder's rights-of-way.

32. Boulder has failed to bring an action in eminent domain, or any other action, to acquire CCC's business, real property, and its contractually created property rights, or any part thereof, and has failed to pay to CCC just compensation or any compensation whatsoever for the taking of its contractually created real property rights and its real property.

33. The conduct of Boulder constitutes an unlawful taking of the total value of CCC's property rights as above-described without due process of law and without fair and just compensation therefor, in violation of CCC's said constitutional rights protected by the Fifth and Fourteenth Amendments to the United States Constitution.

34. By reason of said unconstitutional taking, CCC has been damaged in an amount exceeding $1,000,000, representing the loss to CCC of the value of its CATV system. When the full amount of said damages are known, plaintiff will seek leave of court to amend this Complaint.

FOURTH CLAIM FOR RELIEF
IMPAIRMENT OF CONTRACT

35. CCC incorporates by reference Paragraphs 1 through 34 of the First, Second, and Third Causes of Action as if fully set forth herein, and further alleges as follows:

36. In 1966, CCC became the assignee of the agreement between Boulder and Colorado Televents, Inc., the nature of which created a bilateral contract and thereby gained the right to operate and maintain a CATV system throughout the entire City of Boulder, as it presently existed and as it would exist in the future.

37. Boulder's actions in terminating or revoking CCC's said right and in geographically limiting CCC's right to do business unconstitutionally impaired CCC's contractual rights in violation of Article 1, Section 10, cl.1 of the United States Constitution.

38. By reason of this unconstitutional impairment of contract, CCC has been damaged in an amount exceeding $1,000,000, this representing the loss to CCC of the value of its CATV system. CCC will seek leave to amend this Complaint when the exact amount of said damages can be ascertained.

FIFTH CLAIM FOR RELIEF
CONSPIRACY TO UNREASONABLY RESTRAIN TRADE (SECTION 1 OF THE SHERMAN ACT)

39. CCC incorporates herein by reference the allegations of Paragraphs 2 through 38 above.

40. This claim arises under Section 1 of the Sherman Act (15 U.S.C. § 1) and is brought pursuant to Sections 4 and 16 of

the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction over this claim under 28 U.S.C. § 1337.

41. Providing CATV service involves the doing of business of interstate commerce.

42. Plaintiff has at all relevant times been authorized to and able to provide CATV services to the relevant geographic market defined by the boundaries of the City of Boulder.

43. Defendants, and each of them, have at all relevant times known of plaintiff's intention to provide CATV service to unserved regions of Boulder, and have also known of plaintiff's significant expenditures and efforts towards that goal.

44. On information and belief, plaintiff alleges that Defendants Boulder, Boulder Communications Co., Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalacqua, Barry Telleen, and Dennis DuBé have combined to unreasonably restrain trade and commerce by conspiring to impair and/or destroy CCC's right to construct and operate a CATV system within the City of Boulder.

45. In furtherance of the aforementioned conspiracies, defendants, and each of them, have taken certain actions which include, but are not limited to, the following:

(a) Defendant City of Boulder has consulted with potential competitors of CCC's for the purpose of (1) preventing plaintiff from providing CATV service to those areas of the franchise territory presently unserved; and (2) arranging for one of plaintiff's competitors to monopolize the business of providing CATV service in said unserved areas.

(b) Defendant City of Boulder has adopted the emergency ordinance and Ordinance No. 4472 (see Exhibit C), both dated December 18, 1979 (see Exhibit B), the joint and several effects of which are to restrict and/or destroy CCC's right to compete in unserved areas by restricting and/or destroying its right to expand its area of CATV service in the City of Boulder.

46. The adoption of the above-described ordinances and related actions by defendants were taken and adopted for an anti-competitive purpose and effect, and as such constitute a conspiracy to unreasonably restrain trade in the relevant product market of CATV services and in the relevant geographic market of the City of Boulder. Said anti-competitive actions further constitute a group boycott or concerted refusal to deal, and thereby constitute a *per se* violation of Section 1 of the Sherman Act.

47. As a direct and proximate result of the above-described acts and practices of defendant co-conspirators, competition in the relevant product market and geographic market will be lessened, and a monopoly will be created by unfair means, all to the detriment and destruction of competition in the relevant markets.

48. The violations of the antitrust laws alleged above directly affect and restrain interstate commerce.

49. The above-mentioned violations of the antitrust laws and other illegal actions of defendant co-conspirators, and each of them, have directly and proximately caused damage to plaintiff in amounts as yet unascertained, but which will be set forth in full when determined.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

SIXTH CLAIM FOR RELIEF
BREACH OF CONTRACT

50. This cause of action for damage is asserted against the City of Boulder under the common law of the State of Colorado. Jurisdiction of the Court over this cause of action is ancillary and pendent to the Court's jurisdiction over plaintiff's First through Fifth Claims for Relief. Each cause of action derives from a common nucleus of operative facts and presents legal issues that are inextricably intertwined with those alleged above.

51. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of action as if fully set forth herein, and further alleges as follows:

52. On August 1, 1966, CCC succeeded to all the rights of Colorado Televents, Inc., existing as a result of the contract between Colorado Televents, Inc., and Boulder, dated October 6, 1964, whose terms are contained in Ordinance No. 2846.

53. The agreement was to remain in force for a period of 20 years. A copy of that agreement is attached as Exhibit A hereto.

54. Implied in said bilateral contract by and between CCC and Boulder are the covenants of good faith and fair dealing. These covenants of good faith and fair dealing include the promise that Boulder will do nothing to hinder or harm CCC's right under the contract or CCC's attempts to obtain the benefits of this said contract. Specifically, these covenants include the promise that Boulder will not revoke or terminate CCC's permit established by Ordinance No. 2846 absent good cause, *i.e.*, some action or inaction on CCC's part amounting to a substantial breach of its obligations. These covenants also include the promise that Boulder will do nothing to hinder CCC's ability to do business within Boulder and to obtain subscribers to its CATV system within said city.

55. Boulder's actions in terminating or revoking CCC's permit and in excluding CCC from operating within geographical areas previously accessible to CCC in order to create a competitive advantage for other cable operators constitute willful and deliberate breaches of the covenants of good faith and fair dealing.

56. By reason of the foregoing willful and deliberate breaches of contract by Boulder, CCC has suffered foreseeable consequential damages in an amount exceeding $1,000,000, representing the loss to CCC of the value of its CATV system in the City of Boulder. Finally, by reason of said breaches, CCC has suffered foreseeable and consequential damages in an amount as yet unascertained, representing the loss to CCC of anticipated profits which would be derived from future subscribers in the newly built and served areas. CCC will seek leave to amend this Complaint when the full amount of damages is ascertained.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

SEVENTH CLAIM FOR RELIEF
IRREVOCABLE LICENSE

57. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of Action and Paragraph 50 of the Sixth Cause of Action as if fully set forth herein, and further alleges as follows:

58. Pursuant to the contract of October 4, 1964, Colorado Televents, Inc., and its successors in interest, including CCC, obtained a license to use all of Boulder's public rights-of-way to operate a cable television system. The term of that agreement was 20 years. That agreement is attached hereto as Exhibit A.

59. In reliance upon the grant of this real property interest, and with the prior knowledge and consent of Boulder, CCC expended substantial sums of money to acquire its CATV system from Colorado Televents, Inc.

60. In reliance upon the fact that its license extended to *all* Boulder's streets and rights-of-way, both present and future, CCC recently spent or became obligated to spend some $600,000 to upgrade and expand its CATV system.

61. Due to CCC's expenditures in reliance upon the license granted by Ordinance No. 2846, CCC's license is irrevocable until CCC has had the opportunity to recapture its substantial investments.

62. Boulder's actions in terminating or revoking this license without good cause and its recent imposition of geographical limitations on this license constitute intentional and unlawful interferences with CCC's license.

63. By virtue of Boulder's tortious and unlawful interferences with CCC's irrevocable license, CCC has suffered damage in an amount exceeding $1,000,000, representing the value of its CATV system built in reliance on Boulder's grant of irrevocable license. CCC will seek leave to amend this Complaint when the exact amount of its damages is ascertained.

EIGHTH CLAIM FOR RELIEF
LICENSE COUPLED WITH AN INTEREST

64. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of Action and Paragraph 50 of the Sixth Cause of Action as if fully set forth herein, and further alleges as follows:

65. Pursuant to the contract of October 4, 1964, Colorado Televents, Inc., and its successors in interest, including CCC, obtained a license to use all of Boulder's public rights-of-way. That agreement is attached hereto as Exhibit A.

66. Pursuant to the contract of October 4, 1964, Colorado Televents, Inc., and its successors in interest, including CCC, obtained the right to provide cable television to the residents of Boulder. Pursuant to the contract, the term of that right was 20 years.

67. Incorporated into the contract by which CCC obtained the right to provide cable television service throughout Boulder were covenants of good faith and fair dealing, which precluded termination of that right without just cause.

68. In order to exercise its contract right of providing cable television service throughout Boulder, CCC must have access to Boulder's public rights-of-way. The coupling of the license permitting access to Boulder's public rights-of-way with the right to provide cable television service to all residents in Boulder created an irrevocable license with an interest which extends at least until October 4, 1984.

69. By virtue of Boulder's unlawful revocation of CCC's irrevocable license coupled with an interest, CCC has suffered damage in an amount exceeding $1,000,000, representing the value of its CATV system. CCC will seek leave to amend this Complaint when the exact amount of damages is ascertained.

NINTH CLAIM FOR RELIEF
INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE

70. CCC incorporates by reference paragraphs 3 through 22 of the First Cause of Action as if fully set forth herein, and further alleges as follows:

71. By virtue of the contract of October 4, 1964, and the subsequent lawful and approved assignment from Colorado Televents, Inc., to CCC of all the rights and obligations under that contract, CCC obtained the right to conduct a cable television business throughout Boulder for a period of 20 years, or longer.

72. Boulder and other named defendants have sought to interfere with CCC's lawful conduct of its business throughout Boulder.

73. The attempt to interfere with CCC's lawful business include, but are not limited to, the following:

(a) Boulder has conspired with defendants Cross, Kerner, Thompson, Passalacqua, Telleen, and DuBé, all doing business as Boulder Communications Co., for the purpose of (1) preventing plaintiff from providing CATV service to those areas of the franchise territory presently unserved; and (2) arranging for one of plaintiff's competitors to monopolize the business of providing CATV service in said unserved areas.

(b) Defendant City of Boulder has adopted the emergency ordinance and Ordinance No. 4472 (see Exhibit C), both dated December 18, 1979 (see Exhibit B), the joint and severable effects of which are to restrict and/or destroy CCC's right to compete in unserved areas by restricting and/or destroying its right to expand its area of service within the City of Boulder.

74. By virtue of this unlawful interference with CCC's lawful business, CCC has suffered damage in an amount exceeding $1,000,000, representing the loss to CCC of the value

of its CATV system, and damages in an amount as yet unascertained by representing the loss of prospective revenue to be derived from future subscribers, the loss of goodwill, and the loss of business reputation. CCC will seek leave to amend this Complaint when the exact amount of said damages is ascertained.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

TENTH CLAIM FOR RELIEF
ESTOPPEL

75. CCC incorporates by reference Paragraphs 3 through 22 of the First Cause of Action and Paragraph 50 of the Sixth Cause of action as if fully set forth herein, and further alleges as follows:

76. Boulder was fully aware when it permitted CCC to succeed to the rights of Colorado Televents, Inc., contained in the contract of October 4, 1964, that CCC would expend substantial sums in reliance on the provision in the agreement providing for a 20-year term.

77. CCC in fact expended substantial sums in purchasing the system from Colorado Televents, Inc., and in providing cable television service.

78. Boulder was fully aware that CCC had spent, and would continue to spend, substantial sums in reliance on the 20-year term agreement. In addition, in May 1979, CCC, in reliance on the 20-year term of franchise, embarked on a further spending program.

79. Aware of CCC's plans, Boulder did nothing to indicate any disapproval or any intent to rescind its agreement with CCC.

80. Having permitted CCC to make substantial investments in reliance upon the 20-year term of the agreement, Boulder is now estopped from denying CCC's right to continue expanding its service to areas of Boulder not presently served, and CCC seeks a declaration from this Court to that effect.

WHEREFORE, CCC prays for judgment as hereinafter set forth.

ELEVENTH CLAIM FOR RELIEF
INVALIDITY OF EMERGENCY ORDINANCE

81. Plaintiff repeats and incorporates the allegations contained in Paragraphs 1 through 80 of this Complaint as if fully set forth herein.

82. On December 18, 1979, Defendant Boulder, acting through its City Council, passed an emergency ordinance which purported to immediately revoke CCC's right to build and operate a CATV system throughout the City of Boulder, and which purported to grant CCC the right to operate such a system only within a limited geographic area. A copy of the emergency ordinance is attached hereto as Exhibit B.

83. Boulder's actions in enacting such an ordinance are unlawful and violate, among other things, Sections 17 and 18 of the Charter of the City of Boulder, Colorado.

84. As a direct and proximate result of the enactment and enforcement of the aforementioned emergency ordinance, CCC has incurred damages in an amount which cannot as yet be precisely ascertained but which CCC estimates to exceed $1,000,000.

WHEREFORE, CCC prays that judgment be entered in its favor and against the defendants, jointly and severally, in treble the amount of damages ascertained at trial, plus plaintiff's costs and reasonable attorneys' fees incurred in the prosecution of this action; that the Court enter judgment declaring the aforementioned ordinances to be void and unenforceable, and enjoining Defendant Boulder from any attempt to enforce such ordinances; and that the Court enter an order enjoining the defendants, and each of them, from any further attempts to impair or restrain the plaintiff's construction or operation of a cable television system within the City of Boulder, Colorado, or

elsewhere, and for such other relief as is appropriate in the premises.

DAWSON, NAGEL, SHERMAN & HOWARD

By:_____

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ORDINANCE NO. 4515

AN ORDINANCE PARTIALLY REVOKING ORDINANCE NO. 2846 TO PLACE PERMANENT GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; TO REQUIRE INTERCONNECTIONS WITH OTHER GRANTEES; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc. in 1964 to conduct the business of a community antenna television system in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc. (the current "grantee"), a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, the City Council finds that advanced state-of-the-art cable communications services can and will enhance the quantity and quality of education, news, entertainment, institutional and residential services, cultural opportunities, and opportunities for self-expression available to the public, that such cable communications services can and will promote the convenience of the public and of the commercial and governmental institutions within the City, that such cable communications services may decrease the public's use of energy, and that such cable communications services can and will serve the public interest; and

WHEREAS, the City Council finds that Community Communications Company, Inc. during the past 14 years has failed and neglected to expand its community antenna television system with reasonable expedition to serve all, or even a major portion, of the citizens of the City, and that it has also failed and neglected to offer advance, state-of-the-art cable communications services to the citizens of the City; and

WHEREAS, the City has during the past 14 years received numerous complaints from customers of the grantee within the City concerning poor quality television reception, blacking-out of channels and programs, and unresponsiveness of the grantee in addressing and correcting these operational problems; and

WHEREAS, the City Council finds that during the past 14 years Community Communications Company, Inc. has frequently failed to provide adequate community antenna television service to its customers within the City; and

WHEREAS, the City has received complaints from citizens during the winter and spring of 1980, that, while constructing parts of its community antenna television systems within the City, Community Communications Company, Inc. has needlessly trespassed on private residential property, damaged private residential lawns, shrubbery and gardens, needlessly blocked private driveways and parking spaces, and acted with disregard for the legitimate rights, feelings, and concerns of residents; and

WHEREAS, within the past year, various cable communications companies have displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, during the winter and spring of 1980, the City undertook to enhance the diversity and quality of cable communications services available to the public by conducting an application and selection process for cable communications companies and by offering each applicant a permit to construct and operate a cable communications system within the City in the same geographic areas and in direct competition with one another and with the current grantee; and

WHEREAS, each of the cable communications applicants declined such a permit and requested a permit covering areas within the City from which Community Communications Company, Inc. would be excluded from constructing and operating any cable television system; and

WHEREAS, as a matter of policy, the City Council has looked with favor upon direct competition between cable communications companies within the same geographical areas as the most reasonable means of promoting innovative, diversified, and economical cable communications services within the City; and

WHEREAS, the City Council now reluctantly finds that direct competition between cable communications companies within the same geographical areas is not possible now or in the foreseeable future in the City, and finds further that such direct competition is not now or in the foreseeable future a feasible means of promoting innovative, diversified, and economical cable communications services within the City; and

WHEREAS, the City Council finds that innovative, diversified, and economical cable communications services can be best promoted within the City by placing permanent geographical restrictions on the current grantee, by granting within a reasonably short period of time a permit to a cable communications company other than the current grantee to provide service in other areas of the City, and by requiring reasonable interconnection between the systems of the community antenna television and cable communications companies within the City; and

WHEREAS, the City Council intends within a reasonably short period of time to conduct and complete an additional process of soliciting applications from interested cable communications companies, evaluating such applications, and granting a permit to another company to provide cable communications services in areas primarily outside those areas which may be served by the current grantee; and

WHEREAS, the City Council finds that it is in the public interest to initiate such a process in an expeditious manner; and

WHEREAS, the City Council finds that during the winter and the spring of 1980, Community Communications Company, Inc., has constructed and expanded parts of its community antenna television system in the City; and

WHEREAS, the City Council finds that at times during the winter of 1980, Community Communications Company, Inc., constructed and expanded parts of its community antenna television system in the City in violation of Ordinance Nos. 4472 and 4473; and

WHEREAS, Community Communications Company, Inc. has indicated to the City that it intends to continue to expand

and construct parts of its community antenna television system in the City, absent legislative action by the City Council; and

WHEREAS, the City Council finds that continued construction and expansion of parts of Community Communications Company, Inc.'s community antenna television system in the City will substantially disrupt and impede the process of soliciting applications from other interested cable communications companies, evaluating such applications, and granting a permit to a company other than the current grantee to provide cable communications services in the City; and

WHEREAS, the City Council finds that placing permanent geographical restrictions upon the operations of the current grantee will minimize, if not eliminate, such disruption; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the current grantee would not impair the present services offered by Community Communications Company, Inc. to City residents; and

WHEREAS, the City Council finds that placing permanent geographical limitations upon the operations of the current grantee will not impede its ability to expand its community antenna television services to numerous customers in addition to those it now serves, nor will it impede the grantee's ability to offer innovative, economical, state-of-the-art services to all its customers; and

WHEREAS, the City Council finds that it is in the public interest to place permanent geographical limitations upon the operations of the current grantee, to partially revoke Ordinance No. 2846, and to grant within a reasonably short period of time a permit to an additional company to provide cable communications services in other areas of the City, and to require reasonable interconnection between the systems of the community antenna television and cable communications companies within the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That the revocable permit granted under Ordinance No. 2846 to Colorado Televents, Inc. and its assignee, Community Communications Company, Inc., to conduct the business of a community antenna television system in the City of Boulder is hereby partially revoked, as hereinafter provided.

Section 2. That Ordinance No. 2846 is hereby amended by the addition of the following:

> The grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.
>
> In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.
>
> The right, permit and privilege herein granted is subject to such reasonable requirements as the City Council may subsequently adopt concerning interconnection with other cable systems in the City of Boulder.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

INTRODUCED, READ AND ORDERED PUBLISHED IN FULL this day of A.D. 1980.

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

READ ON SECOND READING, PASSED, ADOPTED AND ORDERED PUBLISHED BY TITLE ONLY this day of A.D. 1980.

_____

Mayor

Attest:

_____

Director of Finance and Record
Ex-officio City Clerk

EXHIBIT A

An area comprised of the following three areas:

(1) A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersects, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station to the area set forth above.

(2) Plus, any area in which the grantee has constructed community antenna television cable plant by July 1, 1980.

(3) Plus, additional areas contiguous to either or both of the two areas specified above, so long as such additional contiguous areas—together with the two areas specified above—contain a total of no more than 9,887 dwelling units. Moreover, such additional contiguous areas shall consist of entire "population and housing districts", as established, effective since 1977, by the Planning Department of the City of Boulder.

MARCH 5, 1980 TRANSCRIPT
[p. 37/ln. 13 — p. 39/ln. 2]

Testimony by Mr. Pilnick
Examination by Mr. Boles

Q. You mentioned a third source of, I guess, lack of free market, and that is, I believe, economic factors you mentioned?

A. The third is the fact of economic facts of life in terms of the cost of building a cable system, and the number of dollars you have to get back, or the number of subscribers you have to have in order to pay for the cost.

Up until recently, and I would say until the last year or so, the cost of a cable system, it is required you have to get back something on the order of perhaps 35 to 50 percent of the homes in a particular area as subscribers. You can argue about the exact percentage, but somewhere about 40 percent or so is a reasonable industry guide.

If you build the system, the cost per mile would be high enough. So that if you have to get about 40 percent of the people in a particular area subscribing at the normal rates, the normal rates are anywhere from perhaps 6 to $10 a month for basic service, and 6 to $10 a month for pay T.V. channel, and if you didn't get something like 40 percent you, in most cases, were in trouble. You couldn't pay for the cost of the construction operation of the system.

Now, what happens if two companies go out in the same market? If they divide the market geographically, that's one situation. If they for one reason or another, if one cable company has half the city, and the other cable company has the other half, then they each have at least the possibility of getting as many subscribers as possible in their half, and they probably get perhaps 40 percent of the homes in their half of the area they are operating to subscribe, but if you have the so-called overbuilt situation where both companies are putting their

cable on the same poles and going after the same customers throughout the franchise area, the general industry statistics indicate that perhaps 40 to 50 percent of the total population will subscribe, and if you have to split that among two companies, assuming they both got an equal share, that would perhaps be 20 to 25 percent for each company, and without a huge increase in rates, which would meet subscriber resistance, it probably would be impossible for either company to make enough money to pay for the cost of the system.

MARCH 5, 1980 TRANSCRIPT

[p. 41/ln. 25 — p. 42/ln. 21]

Testimony by Mr. Pilnick

Examination by Mr. Boles

Q. Approximately how many cable systems are operating in the United States?

A. Including all the small ones and some that might be in either the master antenna category, there is something like 6,000 now.

Q. What does the term overbuilt mean?

A. Overbuilding is usually the phrase that's a trade phrase that means that two cable systems are going to compete for the same geographical area, and if the cable is on the poles it means the second company has to put their cable on the same poles as the first company, or if they are putting it underground, they have to use, in effect, the same underground areas. It means the same physical facilities have to be shared now among two cable companies rather than one, and you are also competing for the same customers.

Q. Of those 6,000 systems you mentioned, how many, to your knowledge, are overbuilt?

A. I am not aware of any myself. I have heard by secondhand information that perhaps half a dozen or so. So that it might be larger than that, but it is still, as far as I know, an insignificant fraction of the total number of systems.

MARCH 5, 1980 TRANSCRIPT

[p. 44/ln. 7 — p.46/ln. 7]

Testimony by Mr. Pilnick

Examination by Mr. Boles

Q. (By Mr. Boles) Are you familiar generally with the demographic characteristics of Boulder?

A. I have read some demographic information. I wouldn't characterize it as being expert or familiar, but I read some pertinent information.

Q. And that information is about 29,000 dwellings, about 90,000—

Q. [*sic*] 82,000 residents, I believe, and estimates that it would take about 200 miles of cable to cable the entire city.

Q. Now, given a city with those characteristics what, in your opinion, would be the likely result if the city issued cable television permits to any cable operator that applied as far as the ultimate number of companies that would survive in that particular territory?

MR. FARROW: Objection, Your Honor. It calls for pure speculation.

THE COURT: Well, I will let him speculate. Go ahead.

THE WITNESS: I think it would depend on when the permits were issued. If one company, as is the case in Boulder, had a permit considerably in advance of others, I would feel that that company would have a strong advantage because they have negotiated a pole attachment already. They have been working with the utilities in terms of clearing additional poles.

All of that would take time for anyone else, and the real question is, who would get on the poles first? Whoever would get on the poles first would have a tremendous advantage both economically and physically.

If you had that situation, where one company had a head start on the other, my evaluation would be that granting permits to others might or might not be an exercise in futility depending upon how much of the city the other companies really had a chance to capture.

If it was too far gone, if the first company had so much of an advantage either in construction itself, or being ready for construction, then you could issue a thousand permits, and of the thousand the remaining 999 permittees would really have no practical chance of building an operating system.

If you were starting from scratch, if you had no existing permittee, and you granted several permits, then it would be a question of, first, which company got into action quickest, and usually that would depend on the resources they could apply in money, in men, in personnel, in materials, and it would also involve whether or not the utilities wanted to deal with all the companies that had permits, or whether they wanted to take it on a first-come, first-serve basis. If they took it on a first-come, first-serve basis, again, the company there first would have an advantage.

MARCH 6, 1980 TRANSCRIPT

[p. 22/ln. 4 — p. 22/ln. 24]

Testimony by Mr. Varnes

Examination by Mr. Boles

Q. Did you have an occasion to talk with any representatives of TCI in the early part of December, 1979, or the end of November, 1979?

A. Throughout the fall I had had numerous occasions to contact, particularly the local System Manager of TCI, to keep track of how the whole process was developing.

In December I had a conversation with TCI's President, Mr. Malone, that was part of a survey that I did at the industry concerning how they would react to various theoretical scenarios that were being considered at the time.

Q. And what did you say to Mr. Malone, and what did he say to you during that?

A. I asked him about how he would feel about the prospect of Boulder throwing the doors more or less wide open to cable competition again, and receiving—accepting and granting applications pretty much to go out the door and begin doing business.

Q. What did he say?

A. He said, sure, it might make them build a little faster. They didn't mind. They would like to be the only show in town. It was okay with them.

[1] Ala. Code § 11-40-1; *Colvin* v. *Ward*, 189 Ala. 198, 66 So. 98 (1914).

[2] Alas. Const. art. X, § 11; *Jefferson* v. *State*, Sup. Ct. Op. No. 1084, 527 P.2d 37 (Alas. 1974); *Rubey* v. *Fairbanks*, 456 P.2d 570 (Alas. 1969).

[3] Ariz. Const. art. XIII, §§ 2-3; *City of Tuscon* v. *Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 195 P.2d 562 (1948).

[4] Ark. Stat. Ann. §§ 19-1042, 19-1043; *Beharse* v. *City of Blytheville*, 254 Ark. 382, 493 S.W.2d 708 (1973).

[5] Cal. Const. art. XI, §§ 2,3,5-7; *Sonoma County Organization of Public Employees* v. *County of Sonoma*, 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Bishop* v. *San Jose*, 1 Cal.3d 56, 81 Cal.Rptr. 465, 460 P.2d 137 (1969).

[6] Colo. Const. art XX, § 6; *Delong* v. *City & County of Denver*, 195 Colo. 27, 576 P.2d 537 (1978);*Century Electric Service and Repair* v. *Stone*, 193 Colo. 181, 564 P.2d 953 (1977).

[7] Conn. Const. art X, § 1; Conn. Gen. Stat. Ann. §§ 7-188, 7-191a, 7-194; *Caulfield* v. *Noble*, 178 Conn. 81, 420 A.2d 1160 (1979).

[8] Del. Code. Ann. tit. 22, § 801-602; *Gage* v. *City of Wilmington*, 293 A.2d 555 (Del. Supr. 1972).

[9] Fla. Const. art. VIII, § 2; *State* v. *Roca*, 172 So.2d 230 (Fla. 1965).

[10] Ga. Const. art IX, § 3, ¶ 1; *Lee* v. *City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966).

[11] Haw. Const. art. VII, §§ 1-2; *Hawaii Government Employees' Ass'n* v. *County of Maui*, 59 Hawaii 65, 576 P.2d 1029 (1978).

[12] Idaho Const. art XII, §§ 1-2; *Bagley* v. *Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942); *Voyles* v. *City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976).

[13] Ill. Const. art VII, § 6 (a,i); *City of Urbana* v. *Houser*, 67 Ill.2d 268, 10 Ill.Dec. 239, 367 N.E.2d 692 (1977).

[14] Ind. Code Ann. § 18-1-1.5-16; *City of Bloomington* v. *Chuckney*, 165 Ind.App. 177, 331 N.E.2d 780 (Ind. App. 1975) (although holding here that power had been denied by statute).

[15] *Wilson* v. *City of Council Bluffs*, 253 Iowa 162, 110 N.W.2d 569 (1961).

[16] Kan. Const. art. XII, § 5; *Claffin* v. *Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973); *City of Junction City* v. *Griffin*, 227 Kan. 342, 607 P.2d 459 (1980); *Junction City* v. *Lee*, 216 Kan. 495, 532 P.2d 1292 (1975).

[17] Ky. Rev. Stat. Ann. §§ 83.410-63.420; *Reconstruction Finance Corp.* v. *City of Richmond*, 249 Ky. 787, 61 S.W.2d 631 (1933).

[18] La. Const. art. VI, §§ 2-6; *Bradford* v. *City of Shrevport*, 263 La. 364, 305 So.2d 487 (1974).

[19] Me. Const. art. VIII, Pt. 2, § 1; *Lewiston Firefighter Ass'n, Local 785* v. *City of Lewiston*, 354 A.2d 154 (1976) (although field here found to have been preempted).

[20] Md. Const. arts XI-A, XI-E; *State's Atty* v. *City of Baltimore*, 274 Md. 597, 337 A.2d 92 (1975); *Birge* v. *Town of Easton*, 274 Md. 635, 337 A.2d 435 (1975).

[21] Mass. Const. art of amend. II; *Board of Appeals of City of Hanover* v. *Housing Appeals Com.*, 363 Mass. 339, 294 N.E.2d 393 (1973); *Bloom* v. *City of Worster*, 363 Mass 136, 293 N.E.2d 268 (1973).

[22] Mich. Const. art. VII, § 22; *Miller* v. *Fabius Township Bd, St. Joseph County*, 366 Mich. 250, 114 N.W. 2d 205 (1962).

[23] Minn. Const. art. XII, §§ 1-4; *A.C.E. Equipment* v. *Erickson*, 277 Minn. 457, 152 N.W.2d 739 (1967); *Town of Lowell* v. *City of Crookston*, 252 Minn. 526, 91 N.W.2d 81 (1958).

[24] Miss. Code Ann. § 21-17-1; *Steitenroth* v. *Jackson*, 99 Miss. 354, 54 So. 955 (1911).

[25] Mo. Const. art. VI, § 18; *St. Louis County* v. *Campbell*, 498 S.W.2d 833 (1973).

[26] Mont. Const. art. XI, §§ 5-6; *U.S. Mfg. & Distrib. Corp.* v. *City of Great Falls*, 169 Mont. 298, 546 P.2d 522 (1976).

[27] Neb. Const. art. XI, § 5; *City of Omaha* v. *Lynch*, 181 Neb. 810, 151 N.W.2d 278 (1967); *Dwyer* v. *Omaha-Douglas Public Bldg. Comm'n*, 188 Neb. 30, 195 N.W. 2d 236 (1972).

[28] Nev. Const. art. VIII, § 8; *Ronnow* v. *City of Las Vegas*, 57 Nev. 332, 65 P.2d 133 (1937).

[29] N.H. Const. Pt. I, art XXXIX; *City of Dover* v. *Wentworth-Douglas Hosp. Trustees*, 114 N.H. 123, 316 A.2d 183 (1974).

[30] N.J. Const. art. IV, § 7; *Inganamort* v. *Burough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973) (although case doesn't find conflict between ordinance and statute).

[31] N.M. Const. art. X, § 6; *Apodaca* v. *Wilson*, 86 N.M. 516, 525 P.2d 876 (1974).

[32] N.Y. Const. art. IX, §§ 1-2; *People* v. *Cook*, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974).

[33] N.C. Const. art VII, § 1; *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972).

[34] N.D. Const. art. VII, § 1; *Litten* v. *City of Fargo*, ____N.D.____, 294 N.W.2d 628 (1980).

[35] Ohio Const. art. XVIII, §§ 3,7; *Canada* v. *Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[36] Okla. Const. art. XVIII, § 3(a); Okla. Stat. Ann. art. XI, § 13-109; *Lee* v. *Norick*, 447 P.2d 1015 (1968); *City of Wewoka* v. *Rodman*, 172 Okla. 630, 46 P.2d 334 (1935); *Pitts* v. *Allen*, 138 Okla. 295, 281 P.126 (1929); *Lackey* v. *Grant*, 29 Okla. 255, 116 P. 913 (1911).

[37] Ore. Const. art. XI, § 2; *Heinig* v. *City of Milwaukie*, 231 Ore. 473, 373 P.2d 680 (1962); *Schmidt* v. *City of Cornelius*, 211 Ore. 505, 316 P.2d 511 (1957); *City of Portland* v. *Welch*, 154 Ore. 286, 59 P.2d 228 (1936).

[38] Pa. Const. art. IX, § 2; *United Tavern Owners of Philadelphia* v. *School Dist. of Philadelphia*, 441 Pa. 274, 272 A.2d 868 (1971).

[39] R.I. Const. art. of amend. XXVIII, §§ 2-4; *Marro* v. *General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971) (although statute found controlling here).

[40] S.C. Const. art. VIII, §§ 9,11; *Dunbar* v. *Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976).

[41] S.D. Const. art. IX, § 2.

[42] Tenn. Const. art IX, § 2; *Southern Ry. Co.* v. *City of Knoxville*, 223 Tenn. 90, 442 S.W.2d 619, Cert. den. 396 U.S. 1002 (1968).

[43] Tex. Const. art. XI, § 6; *Lower Colorado River Auth.* v. *City of San Marcos*, 523 S.W. 2d 641 (1975).

[44] Utah Const. art. XI, § 5; *Wadsworth* v. *Santaquin City*, 83 Utah 321, 28 P.2d 161 (1933) (although case deals with "general law" city).

[45] Vt. Stat. Ann. tit. 24, § 1971.

[46] Va. Const. art. VII, §§ 1-3; *Tabler* v. *Board of Supervisors of Fairfax County*, ____Va.____, 269 S.E.2d 358 (1980). But see also *Kisley* v. *City of Falls Church*, 212 Va. 695, 187 S.E.2d 168, appeal dismissed for want of a substantial federal question, 409 U.S. 907 (1972) for holding that city may, in exercise of its police powers, forbid an act where the state is silent.

[47] Wash. Const. art. XI, § 10; *City of Everett* v. *Fire Fighters Local 350*, 87 Wash. 2d 572, 555 P.2d 418 (1976).

[48] W.Va. Const. art. VI, § 39(a); *Toler* v. *City of Huntington*, 153 W.Va. 313, 168 S.E.2d 551 (1969).

[49] Wisc. Const. art. XI, § 3; *Glendale Professional Policemen's Assoc.* v. *City of Glendale*, 83 Wisc. 2d 90, 264 N.W.2d 594 (1978).

[50] Wyo. Const. art. XIII, § 1.

[51] P.R. Laws Ann. tit. 21, § 1107; *Cabassa* v. *Rivera*, 68 P.R.R. 654 (1948).

MUNICIPAL AUTHORITY

	Source of Authority				Extent of Authority			
	Directly from Constitution	From Legislature authorized by Constitution	From Legislature only	Home rule powers granted by Legislature	Municipality has complete local authority if no conflict with state legislation	Ordinance prevails over conflicting statute on matters of local concern	Charter ordinance prevails over conflicting special state legislation	City can act on statewide concern in absence of prohibition preemption by State
Alabama[1] *			X	X				
Alaska[2]	X				X			X
Arizona[3]	X				X	X		X
Arkansas[4]			X		X			
California[5]	X				X	X		X
Colorado[6]	X				X	X		
Connecticut[7]		X			X	X		
Delaware[8]			X		X			
Florida[9]		X		X				
Georgia[10]		X			X		X	
Hawaii[11]		X			X		X	
Idaho[12]	X				X		X	
Illinois[13]	X				X			
Indiana[14]			X		X			
Iowa[15]			X	X				
Kansas[16]	X				X		X	
Kentucky[17]			X	X				
Louisiana[18]		X		X				
Maine[19]	X				X			X
Maryland[20]	X				X		X	
Massachusetts[21]	X				X		X	X
Michigan[22]	X				X			X
Minnesota[23]	X				X		X	
Mississippi[24]			X	X				
Missouri[25]	X				X			
Montana[26]	X				X			
Nebraska[27]	X				X	X		
Nevada[28]		X		X				
New Hampshire[29]		X		X				
New Jersey[30]	X				X		X	
New Mexico[31]	X				X	X		
New York[32]		X			X			
North Carolina[33]		X		X				
North Dakota[34]		X		X				
Ohio[35]	X				X	X		
Oklahoma[36]	X				X	X		
Oregon[37]	X				X	X		
Pennsylvania[38]	X			X				
Rhode Island[39]	X				X		X	
South Carolina[40]		X		X				
South Dakota[41]	X				X			
Tennessee[42]	X				X		X	
Texas[43]	X				X		X	
Utah[44]	X				X		X	
Vermont[45]			X	X				
Virginia[46]		X		X				
Washington[47]	X				X		X	
West Virginia[48]		X		X				
Wisconsin[49]	X				X			
Wyoming[50]	X				X		X	
Puerto Rico[51]			X		X			

* Supporting footnotes located on reverse side of this chart